S. HRG. 99-632

NOMINATION—FEDERAL TRADE COMMISSION

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

DANIEL OLIVER, TO BE CHAIRMAN, AND ANDREW J. STRENIO, JR., TO BE A COMMISSIONER, FEDERAL TRADE COMMISSION

FEBRUARY 25, 1986

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DANIEL OLIVER, TO BE CHAIRMAN AND ANDREW J. STRENIO, JR., TO BE A COMMISSIONER, FEDERAL TRADE COMMISSION

TUESDAY, FEBRUARY 25, 1986

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room 253, Russell Senate Office Building, Hon. Robert W. Kasten, Jr., presiding.

Staff members assigned to this hearing: Macky Ayers, professional staff member; Chuck Hardwood and David Zorensky, staff counsels; and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order. Today the Committee on Commerce, Science, and Transportation is considering the nominations of Daniel Oliver and Andrew J. Strenio, Jr., to the Federal Trade Commission.

The President has nominated Daniel Oliver for the remainder of former FTC Chairman Jim Miller's term, which expires in September 1988. In addition, the President has announced that he intends to designate Mr. Oliver as the chairman of the Federal Trade Commission.

Mr. Oliver is a graduate of Harvard College, Fordham Law School, currently the general counsel of the Department of Agriculture, the same position which he previously held at the Department of Education. He has also been associated with two New York law firms and served as the executive editor of the National Review.

Mr. Oliver, if you could come forward at this time. We are pleased to have your nomination before us. We are aware of the fact that you have been previously confirmed by the Senate in these two previous positions of general counsel and we wish you well.

At this point I would like to ask if Senator Ford has any opening comments.

Senator FORD. I have no opening comments, Mr. Chairman. I do thank you for the opportunity.

Senator Hollings has one that he would like inserted in the record.

[The statement follows:]

OPENING STATEMENT BY SENATOR HOLLINGS

The Committee on Commerce, Science and Transportation is today considering Daniel Oliver and Andrew J. Strenio, Jr., as nominees to the Federal Trade Commission (FTC).

Daniel Oliver has been nominated by the President to serve for the remainder of former FTC Chairman Jim Miller's term, which expires in September of 1988. The President has also expressed his intentions to designate Mr. Oliver Chairman of the FTC.

Mr. Oliver is a graduate of Harvard College and Fordham Law School. He is currently the General Counsel of the Department of Agriculture. He served in the same position for the Department of Education. Mr. Oliver has been associated with two New York law firms, while also serving as the Executive Director of the National Review.

The President has nominated Andrew Strenio to fill former Commissioner George Douglas' term which expires in September of 1989. Mr. Strenio graduated from Princeton University, and received graduate degrees from both Harvard Law School and Harvard's John F. Kennedy School of Government. Mr. Strenio served as a commissioner at the Interstate Commerce Commission until his term expired last year.

Mr. Oliver and Mr. Strenio have responded to extensive pre-hearing questions from both the majority and minority. There will also be post-hearing questions from the minority.

Senator KASTEN. Mr. Oliver, we are pleased to have you before us. We understand that there are members of your family who have come here today. Please go forward with your statement, and introduce your family as well. We are pleased to have them here.

We have your biography which will be included in the record.

[The biographical sketch follows:]

BIOGRAPHICAL SKETCH OF DANIEL OLIVER

Address: 3105 Woodley Road, N.W., Washington, D.C. 20008.

Date and place of birth: April 10, 1939, New York, New York.

Marital Status: Married to Anna Louise Vietor.

Names and ages of children: A. L. Oliver, 17; A. Oliver II, 15; D. Oliver, Jr., 13; S. F. Oliver, 8; and P. A. Oliver, 5.

Education: Fordham Law School, New York, New York, 1964–67, LL.B., June, 1967. Harvard College, Cambridge, Massachusetts, 1957–59, 1962–64, A.B., June, 1964. Milton Academy, Milton, Massachusetts, 1952–57, Diploma, May, 1957.

Employment Record: New York Life Insurance Co. (Legal Department), 51 Madison Avenue, New York, New York, Legal Researcher, June 1985–August 1985.

Hawkins, Delafield & Wood, 67 Wall Street, New York, New York, Associate, June 1966–September 1966, August 1967–June 1970.

Buckley for Senate, Madison Avenue, New York, New York, Director of Research, June 1970–November 1970.

National Review, 150 East 35th Street, New York, New York, Assistant to the Editor, November 1970–May 1971.

Alexander & Green, 120 Broadway, New York, New York, Associate, May 1971–May 1973.

National Review, 150 East 35th Street, New York, New York, Executive Editor, September 1973–May 1976.

Alexander & Green, 299 Park Avenue, New York, New York, Associate, May 1976–December 1979.

Self-employed, 59 Upland Drive, Greenwich, Connecticut, private consultant, January 1980–March 1981.

Reagan-Bush Education Transition Team, 330 C Street, N.W., Washington, D.C., Consultant, November 1980–January 1981.

U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C., Consultant, March 1981–August 1981.

U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C., General Counsel, August 1981–November 1983.

U.S. Department of Agriculture, 14th and Independence Avenue, S.W., Washington, D.C., General Counsel, November 1983–Present.

Government Experience: See above.

Honors and Awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, and any other special recognitions for outstanding service or achievement: None.

Published writings: List the titles, publishers and dates of books, articles, reports, or other published materials you have written: While working at *National Review* (1973–76), I wrote a regular column for the *National Review Bulletin*, a fortnightly publication, entitled "At Home," and occasional pieces for the magazine as follows: "The Amnesiacs," dated May 25, 1973; "What Conservatives Are Telling Each Other," dated March 1, 1974; "A Passage Through Indochina," dated August 2, 1974; "The Other Imperialists," dated January 31, 1975; "Taking the Initiative," dated March 14, 1975; "Thinking Man's Guide to Sentencing," dated August 29, 1975; "The Politics of Giving 'Em Hell," dated January 23, 1976; and "Magical Way," dated October 29, 1976. The following articles were also published in *National Review:* "Constitutional Nonsense," dated December 23, 1977; "Feeding the Sheep," dated March 3, 1978; "A Story of Transitory Madness," dated November 10, 1978; "Counting the Sheep," August 31, 1979; and "Creeping Sanity," dated October 26, 1979; "Roll Over, Thomas Cranmer," dated October 19, 1984. I also wrote a piece for *Juris Doctor* in 1976 entitled "Poverty Law and Heretics in Perspective." There may be others I have forgotten and omitted.

STATEMENT OF DANIEL OLIVER

Mr. OLIVER. Thank you, Mr. Chairman. I do have here my wife and four of my five children.

Senator KASTEN. Why don't all of you stand up back there so we can see who you are.

Mr. OLIVER. My wife Louise, my daughter Louisa, my daughter Suzanna, my son Peter, with bear, and my son Danny, without bear.

Senator KASTEN. We are pleased to have the family and the bear. Mr. Oliver.

Mr. OLIVER. Mr. Chairman, it is a great honor for me to have been nominated by President Reagan to be a Federal Trade Commissioner and a great pleasure to appear before you today.

In 1914, Mr. Chairman, Congress took formal note that the interests of consumers and producers were different. But the differing interests of consumers and producers weren't discovered in 1914.

Some years earlier, an economist had written, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." Those are the words, of course, of Adam Smith, the patron of free market conservatives.

Mr. Chairman, I quote Adam Smith in order to dispel the belief some people have that the heritage of the free marketers encourages them to ignore consumers and to apotheosize producers. That, in my definition, is laissez faire, not free market economics. Adam Smith, as his words indicate, was perhaps the world's first consumer advocate.

But contriving producers are not the only people consumers have to fear. They also need protection from special pleaders, pleading the limited concerns of special interests. "It is of serious interest to the country", President Woodrow Wilson declared in 1913, "that the people at large should have no lobby and be voiceless in these matters, while great bodies of astute men seek to create artificial opinion and to overcome the interests of the public for their private profit."

A year later, President Wilson urged Congress to create the Federal Trade Commission.

Mr. Chairman, the Federal Trade Commission has a long and distinguished history of protecting consumers. It is not my intention, if I am confirmed to the position of commissioner of the FTC, to preside over the abandonment of consumers either to contriving producers or to special pleaders.

And now, Mr. Chairman, I would be happy to try to answer any questions you or any other members of the committee may have.

Senator KASTEN. Mr. Oliver, first of all, thank you for your statement. One of the things that we on the Consumer Subcommittee are concerned about in terms of our overall responsibilities, not only for reauthorization but also for oversight, is the overall kind of communications that we have as the Consumer Subcommittee of the Commerce Committee with the Federal Trade Commission and particularly with the Chairman.

What steps will you take to ensure that Congress is fully apprised of the Federal Trade Commission's activities?

Mr. OLIVER. Senator, I would be happy to consult with you at any time to keep you, to the extent I can appropriately, informed of what we are doing and respond to any questions and concerns you may have.

Senator KASTEN. One of the questions that has been raised by, I am told, a few Members of Congress is the question of whether State attorneys general should be given the power to enforce unfair deceptive acts or practices authority.

Do you believe that State attorneys general should be given the power to enforce the Federal Trade Commission's unfair or deceptive acts or practices authority?

Mr. OLIVER. Mr. Chairman, I don't know whether they should have or need that power, and so I really can't answer that question fully. I think it would depend on, to some extent, on whether there was a demonstrated need.

I don't know if, for example, State attorneys general have requested, for example, the Federal Trade Commission to enforce the FTC Act in their State and have been, for example, turned down by the FTC. If that were the case, if there seemed to be a pattern of not being able to get the Federal Trade Commission to respond, then it might be something that we should consider.

I am not saying there isn't any need but I don't know whether or not there is a need for that kind of legislation.

Senator KASTEN. I think it is one of the issues that we may be pursuing and I thank you for your answer. Senator Ford.

Senator FORD. Thank you, Mr. Chairman. Mr. Oliver, why do you want to be Chairman of the Federal Trade Commission?

Mr. OLIVER. I have long had an interest in economics and in watching the market, Senator Ford. And I have been concerned in the past, as I guess many or most of the appointees of President Reagan have, with the extent of Government regulation of the marketplace.

And I would like to be part of that regulating process to try to ensure that there is not too much regulating and also, of course, not too litte. And that, I think, is part of the attraction of the FTC, of having the chance to attempt to steer the proper course down the middle between too much regulating and too little.

Senator FORD. Do you believe that small businesses are entitled to the protection of the antitrust laws and the Federal Trade Commission Act by enforcing the law against unfair competition and predatory acts by larger, more powerful competitors?

Mr. OLIVER. Well, Senator, I think that those laws should be enforced. Just exactly what the effect is in any particular case is hard to say. I think that the laws should be enforced. I think it is probably hard to say always how the chips fall when the law is enforced as it is written.

Senator FORD. But you do believe that small business is entitled to the protection of antitrust laws and the Federal Trade Commission Act by enforcing law?

Mr. OLIVER. Yes, sir. I believe the small businesses are as much entitled to it as any other business is entitled to the protection of the law.

Senator FORD. Sometimes a little fellow fights city hall every once in a while and it is particularly important that those in authority exercise an open mind. Because when he hires a law firm to represent him, that is probably every dime he has. And major operators have a retainer, you know.

So it does make it somewhat different. I want to be sure that at least you are on record saying small businesses would get fair treatment.

Mr. OLIVER. Yes, sir.

Senator FORD. Let me ask you this: Do you support amending the antitrust laws so that treble damages are eliminated except for horizontal price fixing cases?

Mr. OLIVER. Senator, I understand the administration has a proposal like that, if it is not exactly like that. I was not consulted, clearly, obviously, as the administration constructed that proposal. I have not read any background papers, reports or studies or statistics in connection with it.

And I, therefore, really have no informed opinion of whether that is necessary or not. I am perfectly happy to look at it and it may well be a good idea, but it is not a matter that I have studied myself and I hesitate to give an answer without having an informed opinion.

Senator FORD. You are going to be chairman. While I understand that you haven't been there yet, and you haven't had an opportunity to study these questions, once you become Chairman, that is the end of it. And we don't know what your attitude is prior to going in.

That is one of the reasons for the hearings. And we seem to always get evasive answers.

Let me ask you a fairly long question.

I have been hearing from a number of independent pharmacy owners and a major drug chain that is headquartered in my State concerning a problem that is related to the discriminatory pricing policies for prescription drugs.

It is my understanding from them, that pharmaceutical companies are permitted by a 1938 law to sell their products at significantly lower prices to nonprofit health care facilities. However, drugstore owners in my State have advised me that the law is being abused and that these retail pharmacies cannot compete with

hospitals or HMO's that commonly buy their drugs in excessive amounts and enormous discounts ranging from 40 to 60 percent less than the retail pharmacies can buy them from the manufacturer.

My question to you is this: Is this an anticompetitive issue or a violation of the Roberson-Pattman Act that the Federal Trade Commission should be actively and thoroughly investigating?

Mr. OLIVER. Well, Senator, if it is a case of price discrimination, it would be a matter that the FTC should investigate. I don't know whether it is investigating it, obviously. It may well be something that the FTC should take under advisement. I have to look at all the facts. I don't know the answer to that.

Senator FORD. Well, what would these people have to do in order to get you to investigate?

Mr. OLIVER. Senator, I don't know how investigations are started at the Commission. There is a procedure that the Commission uses, I understand, for initiating investigations. I do not know what that procedure is.

I would be perfectly happy to, if I were there, to make inquiries and see if it were not being investigated, why it were not being investigated.

Senator FORD. How long have you known that you were going to get this position?

Mr. OLIVER. Several months, Senator.

Senator FORD. During those several months, how hard have you looked at the FTC to find out its functions and areas it covers and things of that nature?

Mr. OLIVER. I have reviewed a number—read—some cases and reviewed as best I could.

Senator FORD. You haven't attempted to be briefed on the procedures of the Commission?

Mr. OLIVER. No, sir; I have not.

Senator FORD. Thank you, Mr. Chairman.

Senator KASTEN. Mr. Oliver, I have no further questions. There are, I understand, some questions that may be submitted to you in writing from other members of the committee who are unable to be with us today. I will submit those questions to you, along with additional questions which we have. And we will ask you to get back to us in a timely fashion with the answers to those questions.

Senator FORD. Bob, I have some post-hearing questions I would like to submit to Mr. Oliver.

Senator KASTEN. Without objection, the questions will be submitted from both sides. And we look forward to working with you. I think the fact that you have been confirmed twice by the U.S. Senate will mean that you are very likely to be confirmed once more, so we look forward to working with you in what will be your new capacity as Chairman of the Federal Trade Commission. And we thank you very much for your testimony today.

Mr. OLIVER. Thank you, Mr. Chairman.

Senator KASTEN. Next, could we have Mr. Strenio come forward. Andrew Strenio has been nominated by the President to fill the remainder of former Commissioner George Douglas' term which expires in September 1989.

Mr. Strenio holds graduate degrees from Harvard Law School and Harvard's Kennedy School of Government. His undergraduate degree is from Princeton University. Mr. Strenio most recently served as a commissioner at the Interstate Commerce Commission. His term expired at the end of last year.

Between January 1982 and September 1984, he served at the Federal Trade Commission as Assistant Director for Regulatory Evaluation. In that position he received a Federal Trade Commission special award for excellence.

Mr. Strenio also has been associated with a Washington DC law firm, served as a staff economist to the President's Council of Economic Advisers and has authored a book entitled "The Testing Trap."

First of all, Senator Ford, do you have an opening statement or comment? I would like then at this time to insert in the record his biographical sketch and acknowledge statements of support for Mr. Strenio from our distinguished colleagues, Senator Mathias, Senator Bradley, and Senator Heinz.

And I will ask that those statements be inserted in the record. Mr. Strenio, we look forward to your testimony.

[The biographical sketch follows:]

BIOGRAPHICAL SKETCH OF ANDREW JOHN STRENIO, JR.

Address: 5525 Lincoln Street, Bethesda, Maryland 20817.

Date and place of birth: April 3, 1952, Erie, Pennsylvania.

Marital status: Married to Judith Lee Ferington.

Names and ages of children: Elizabeth (3), Andrew (1).

Education: Harvard Law School and the Harvard Kennedy School of Government, 1974–1978, J.D. and Master of Public Policy Degree, June 1978; Princeton University, 1970–1974, A.B., June 1974; and Hamden High School, Hamden, Connecticut, 1967–1970, High School Diploma, June 1970.

Employment Record: Served as a Commissioner at the Interstate Commerce Commission from September 1984 through December 1985; Assistant Director for Regulatory Evaluation, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.—supervising the Commission's Intervention Program in behalf of consumers and competition—from January 1982 to September 1984 (named Assistant Director in July. 1982); Staff Economist and sole lawyer with the President's Council of Economic Advisers, specializing in regulatory matters, Washington, D.C., 1980–1981; Attorney with the law firm of Wald, Harkrader & Ross, Washington, D.C., 1980; Research Associate on educational testing for the Huron Institute, Cambridge, Massachusetts, 1978–1979; Researching and writing *The Testing Trap* (Rawson & Wade, New York: 1981), a book about the educational testing industry, Cambridge, Massachusetts and Washington, D.C., 1978–1980; Law Clerk for one-half of the summer with Sachnoff, Schrager, Jones & Weaver, Ltd., Chicago, Illinois, and for the second half with Kirkpatrick, Lockhart, Johnson & Hutchison, Pittsburgh, Pennsylvania, Summer 1977; Teaching Assistant in Microeconomics Course at the Kennedy School of Government, Cambridge, Massachusetts, Fall Term, 1976–1977; Law Clerk, Attorney General's Office of Policy and Planning, Department of Justice, Washington, D.C., Summer 1976; Research Assistant for Harvard Law School and Institute of Politics, Cambridge, MA, Summer 1975 to Spring 1976; Management Analyst, Office of Management Systems, Federal Energy Administration, Washington, D.C., Summer 1974; also, Researcher for Kennedy School of Government, Cambridge, Massachusetts, Spring 1977 to Fall 1978; Research Assistant for the Dean of the Kennedy School of Government, Cambridge, Massachusetts, Summer 1978; Exam Grading Assistant, Harvard Law School, Cambridge, Massachusetts, May 1978; Researcher for the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison while in Cambridge, Massachusetts, October 1976; and Freelancer for *Boston Magazine* article while in Cambridge, Massachusetts, April 1976 issue and for *Harper's Bazaar* article while in Washington, D.C., June 1983 issue.

Government Experience: See above.

STATEMENT OF ANDREW J. STRENIO, JR.

Mr. STRENIO. Thank you, Mr. Chairman. I would like to thank you very much for this opportunity to appear before you. To begin with, I would like to thank Senators Bradley, Mathias, and Heinz for their kind letters of support. I also am honored by the confidence the President has placed in me by virtue of this nomination.

In the interest of brevity, I have just three additional points to make. First, I view the responsibilities of a member of the Federal Trade Commission with the utmost seriousness. The FTC's role in protecting consumers and fostering competition is vital to the fair and efficient functioning of our national economy.

I can assure you that if confirmed, I will enforce the law to the best of my ability and examine the issues that come before me fully, fairly and with an open mind.

Second, if confirmed, I look forward to a continued close relationship with this committee through the exchange of ideas, information and opinions all intended to constructively help the FTC in its twin missions of antitrust enforcement and consumer protection.

Third and finally, I want to thank all of those whose support for me is responsible for my appearing before you this morning. To all my family, friends and former colleagues, and in particular to my wife and children, whose love and understanding have sustained me, I want to express my deepest thanks.

Mr. Chairman and members of the committee, I would be glad to answer any questions you may have. And I would just like to take this opportunity to introduce my wife who has freshly arrived from the snows of Rockville this morning.

Senator KASTEN. Why don't you stand also. We are very pleased to have you with us this morning. This is kind of a Wisconsin winter in Washington.

Mr. STRENIO. Senator, I am from Erie, PA, and I find this to my liking.

Senator KASTEN. As I asked Mr. Oliver, one of our key responsibilities is the oversight and also the reauthorization of the Federal Trade Commission. You made a brief reference in your statement to it but what steps will you take to ensure that Congress, and particularly this committee, is fully apprised of the Federal Trade Commission's activities?

Mr. STRENIO. Senator, I think it is extremely important that the Federal Trade Commission work in close harmony with this committee and, indeed, with the other oversight committees on the hill.

What I have in mind, if confirmed as commissioner of the FTC, is to continue the practice that I followed as a commissioner at the ICC, which is being not only available constantly to members and their staffs but also going out and seeing from time to time if there are particular questions about FTC procedures or if there are any issues that have arisen that are of particular concern to members of the committee.

As I said, I think that is an extremely important function. The FTC is a body that is responsible to the Congress and I intend to adhere to that principle, if confirmed.

Senator KASTEN. Recently there has been some criticism of the Federal Trade Commission's intervention program. Based on your

experience with this program, what are the benefits of the intervention program for business and for consumers?

Mr. STRENIO. Senator, I think there are very substantial benefits to that program for business and for consumers. I think that the primary purpose of the intervention program could be summed up in the adage that an ounce of prevention is worth a pound of cure.

What the program is about is the FTC sharing its expertise on competitive issues and on issues that would vitally affect consumers before other governmental bodies. The fact is, at least in my experience with the intervention program, the FTC was very frequently the sole representative of consumers' interests before various governmental bodies and alone in advancing particular concerns of consumers.

I think that that is an important function. And I think it is a way that the FTC, not by telling other people what to do, but by sharing the insights that our staff has can make a contribution to policy in general.

In terms of specific proposals, I think that the FTC's intervention program also provides a benefit by laying out innovative approaches for the consideration of the various governmental bodies that would allow them to achieve the same objectives that they have set out to do, but in a way that would be less costly for consumers or pose less risk to the vigorous competition that we want to be a part of the Nation's economy.

Senator KASTEN. As a result of budget constraints, and I am asking you this as someone who has been at the Federal Trade Commission, the Commission voted to furlough employees for 3 days. In light of your experience with furloughs at the ICC, what impact will a furlough have on the Federal Trade Commission?

Mr. STRENIO. Mr. Chairman, I think that the impact can only be a negative one in terms of the morale of the staff. The FTC is very fortunate to have a very capable and talented staff and those dedicated individuals, I think, by and large will make every effort to remain with the Commission.

But it is difficult for morale, as I am sure you understand, for professionals who are giving their all and in many cases putting in substantial overtime without any compensation to have a situation where not only are they undergoing furloughs but there is uncertainty as to the future consequences of the budget.

I know that was a very difficult problem for us at the ICC. And I think that the problem is there for the FTC as well. It behooves the commissioners to, and I am certain we will, take every effort to address the concerns of staff and to proceed in the most responsible fashion. But I cannot say anything other than that it is a problem.

Senator KASTEN. Senator Ford.

Senator FORD. Thank you, Mr. Chairman. Mr. Strenio, I will ask you basically the same questions I asked Mr. Oliver. Do you believe small business is entitled to the protection of the antitrust laws and the Federal Trade Commission Act by enforcing the law against unfair competition and predatory acts by larger and more powerful competitors?

Mr. STRENIO. Senator, yes, I do think they are entitled to that protection and I think that the basic reason why it is important for them to receive that protection is that in many cases small busi-

nesses are the businesses that are providing the cutting edge of competition in particular industries.

Without protection against unfair practices or against predation, it is the consumers that would ultimately lose out if the larger companies were able to exercise market power, raise prices or reduce output.

The difficulty, of course, for us is carefully separating out those instances where a larger, more powerful company is behaving in an anticompetitive fashion and exercising unfair tactics from those instances where what that company is doing is vigorously competing to the benefit of consumers. And that is something that we have to pay very careful attention to, to make sure that we do not inadvertently hurt consumers when we are trying to help them.

But I have no reservation whatsoever in saying to you that small businesses are very much entitled to protections that are on the books. And I will do my very best to enforce those laws.

Senator FORD. What is your position on the antitrust proposal of the administration?

Mr. STRENIO. Senator, I have not come to a conclusion on those proposals. I think that what is proposed involves some significant changes across the board in antitrust law. And I think that those changes have to be the subject of very serious study here and elsewhere before changes are made.

I am aware of the arguments that, as in the international trade area, for example, that we need to make our industries and our companies more competitive with foreign companies. And I am very sympathetic to that concern.

At the same time, I think that if there are changes, we have to be absolutely certain that they do not produce anticompetitive effects that outweigh any benefits that might be gained as a virtue of those changes.

I heard your remark earlier about the generalities with which nominees often have to address the questions, and I am sorry I can't give you a yes or no answer at this time. But I do think that those proposals have to be given very serious study. And I don't have any predisposition one way or the other at this point.

Senator FORD. Let me ask you this question: Should Congress write a statutory definition of deception as we did with unfair acts and practices so as to clarify the law?

Mr. STRENIO. Senator, I think that as a general matter it is always a desirable goal to clarify the law so that citizens and affected businesses are able to have a better understanding of exactly what the requirements are upon them, both so that they do not run afoul of those particular requirements and also so they do not hesitate in doing other things that would be perfectly legal and would redound to the benefit of consumers but they are needlessly afraid might cause a legal problem.

As to whether we have a need to codify the deception standard or any particular set of deception standards, I am not certain that is something that absolutely needs to be done. I understand the FTC has made efforts in terms of refining its implementation and its guidelines but I would certainly welcome any congressional interest in this area and cooperate to the fullest.

Senator FORD. I have supported a definition of "unfairness" but did not see a need for a statutory definition of "deception" in the past because it has been my understanding that the case law was sufficiently developed in this area. I was interested in your opinion.

One final question. You have worked at the Federal Trade Commission before as an employee.

Mr. STRENIO. Yes, sir.

Senator FORD. And do you have any problem with identifying legal and policy issues with which you might disagree or have a different opinion than the leadership then or on in the future?

Mr. STRENIO. No, sir. I have great respect for a number of my former, and I hope future, colleagues at the FTC, but I make up my own mind. And I am very much committed to, and I think demonstrated that I exercise, a very independent outlook in terms of my conclusions.

So while in some respects it is a homecoming to be rejoining a number of people with whom I worked before, I am very clear in my mind, and I believe they all understand as well, that as far as decisions made as a commissioner and as far as the policy and legal practices of the FTC, that I am my own man and intend to remain that way.

Senator FORD. That is good. In the past it seemed that the only criteria was that the new commissioners be a clone of the Chairman. I am glad to know that you are independent. And I look forward to your independence because I think it would be helpful to the consumer.

Mr. STRENIO. Thank you, Senator.

Senator KASTEN. Senator Gore.

Senator GORE. Thank you.

Senator KASTEN. Thank you, Senator. There are questions which may be submitted from members of the panel. I know there are questions that will be submitted by people on our side that have not had an opportunity to be here this morning. And we may have some additional questions.

Those questions will be submitted in writing and we are hopeful that you can get back to us with the answers in a reasonable length of time.

Mr. STRENIO. I will certainly do that.

Senator KASTEN. There are no further questions at this time. We look forward to working with you. It is my hope and intention that we will proceed very expeditiously with both of these nominations so that we can move forward and have a confirmation vote occur in the full Senate at the earliest possible date.

Thank you very much for your testimony. The hearing is adjourned.

[Thereupon, at 10:35 a.m., the committee adjourned.]

[The following information was subsequently received for the record:]

PREHEARING QUESTIONS OF THE MAJORITY AND THE ANSWERS OF MR. OLIVER

Question 1. What do you perceive to be the major role or mission of the Federal Trade Commission? Is there another entity, public or private, that may be better suited to performing this role or mission?

Answer 1. The role of the FTC is to protect the freedom of the market—to police the market in order to correct, where possible, imperfections that may exist—by promoting competition among businesses and by protecting consumers from being deprived of the ability to make adequately informed purchases. The FTC shares antitrust jurisdiction with the Department of Justice. I believe that sharing has worked well over the years, and I have no plans to recommend fundamental reorganization. There is no government agency currently involved in protecting consumers from unfairness and deception the way the FTC does. One of the functions the FTC was originally designed to perform was economic research for the government. There is no reason why private institutions can't share that function, but I suspect the FTC's peculiar situation makes its research particularly useful.

Question 2. What areas of present FTC activity do you believe should be given the highest priority? Please specify the reasons for your choice.

Answer 2. I believe that deliberate, conscious efforts to undermine the competitive working of the market should be the primary focus of FTC activities though not, of course, to the exclusion of other laws the Commissioners are bound to enforce. Cartel-like conduct presents the greatest likelihood of consumer injury. Horizontal mergers should also receive careful scrutiny. Vertical integrations and restraints should not be ignored, but I believe modern scholarship suggests that they are less likely to cause harm to consumers than was previously thought. The FTC should also police the market to discourage such activities as fraud, deceptive advertising, and breach of conduct and illegal credit practices. Which deserves priority probably depends on the particular cases before the FTC.

Question 3. In light of the recently ordered sequestration of budget resources pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, are there particular FTC activities that you believe should be redirected or discontinued? Please specify.

Answer 3. I have not studied the FTC's budget, and am therefore unable to say how funds might be redirected, or which functions, if any, might be discontinued. Prosecutions have two functions: to punish law violators, and to deter others from violating the law. If there were an area where compliance with the law were very high, and the deterrence value of prosecuting therefore low, it probably would not make sense for the Commission to deploy substantial resources in that area.

Question 4. Are there any areas in which you think the FTC Act should be amended in order to enhance the FTC's ability to enforce its mandate? If so, what are those areas and what changes do you recommend? Are there any areas that should be cut back, transferred, or redefined through legislation? What about other statutes administered or enforced by the FTC?

Answer 4. The FTC's mandate is broad, and perhaps not sufficiently clear in some areas. I would support an attempt like that made in the Senate's proposed authorization legislation to define the Commission's unfairness jurisdiction. I also believe the Commission should consider whether codifying a definition of deception would be useful. Recently a definition was proposed which, it was claimed, only codified existing law. Objections were raised that the proposed definition differed substantially from current case law. Clearly, there is some confusion over what the current state of the law is. For the benefit of those who are bound to obey the law, the confusion should be cleared up. In addition, there are some technical amendments that would probably be useful, such as codifying the Braswell decision and removing the provision that automatically stays Commission cease and desist orders pending appeal. I am not sufficiently familiar with the other statutes the Commission administers or enforces to have an opinion on whether changes in them would be useful.

Question 5. Critics have sometimes asserted that there is no need for two antitrust agencies—the Federal Trade Commission and the Justice Department. What is your view?

Answer 5. The dual jurisdiction seems to have worked well in the past. The FTC has no criminal jurisdiction, so the Department of Justice must handle all criminal matters. The FTC was originally created to provide economic information to Congress and the courts. Critics have long asserted that there are or may be better configurations for federal agencies. It may be that the current arrangement of dual antitrust jurisdiction is not the optimum arrangement, and that if we were to recreate all the federal bureaucracies de novo, a different configuration for handling antitrust matters would result. However, I have no plans to recommend fundamental restructuring.

Question 6. What areas of the FTC's antitrust enforcement authority would you emphasize and which would you deemphasize? Why? In your answer, please specifically address enforcement in the areas of: (a) Conglomerate and vertical mergers; (b)

Vertical non-price restrictions; (c) Resale price maintenance; (d) Predatory pricing; and, (e) Price discrimination.

Answer 6. As I mentioned in response to question 2, I believe that deliberate, conscious efforts to undermine the competitive working of the market have the most potential for mischief in the economy, and should, consequently, be more carefully scrutinized by the FTC than activity in other areas. While the Commission is obligated to enforce all the laws under its jurisdiction, I believe modern scholarship suggests that all five of the economic practices addressed by this question may be less harmful or more beneficial to consumers than previously thought, at least in some areas.

(a) Conglomerate and vertical mergers probably do not need to receive more emphasis than they have in the past few years. While they should, of course, not be ignored, there are other areas of economic activity—horizontal mergers, and cartel-like behavior—where consumers' well-being is at greater risk.

(b) Vertical non-price restrictions are now subject to rule of reason scrutiny. That does not mean that all such restraints are considered to be harmless. Nevertheless, they should be handled on a case-by-case basis.

(c) Resale price maintenance, on the other hand, is illegal per se, and the Commission is obligated to enforce the law.

(d) The difficulty with enforcing the law with respect to predatory pricing is in determining what the appropriate price is below which a price becomes predatory. One man's predatory pricing is another man's aggressive discounting. In prohibiting the former, great care must be taken not to deter the latter.

(e) As with predatory pricing, it is sometimes difficult to tell what is a proper price and what is a discriminatory price. Selling in bulk or the cost of transportation may affect price, and it is important not to deter lower prices when they are appropriate.

Question 7. What authority should the FTC have over state-regulated professionals?

Answer 7. I believe the FTC should retain jurisdiction over the business practices of professions as distinguished from their professional practices.

Question 8. What statutory changes would you suggest, if any, in the FTC's authority to prohibit deceptive advertising?

Answer 8. As I mentioned in my response to question 4, I believe the Commission should investigate whether codifying the deception standard would be useful or necessary. I have not formed an opinion at this point on whether a statutory amendment should be recommended.

Question 9. Do you believe the FTC's program in the area of advertising substantiation has been effective? What changes, if any, do you believe should be made in such a program?

Answer 9. The FTC has recently conducted a review of the effectiveness of the advertising substantiation program, and has, I believe, recommended no changes. I have not read the review, and am not able myself to make a judgment on the program's effectiveness.

Question 10. Should the FTC have authority to require affirmative rules of conduct in trade rules? In orders? Do you have any views as to how corrective advertising might be used more effectively in cases where false and misleading advertisements have been presented to the public?

Answer 10. I believe the FTC should have authority to require affirmative rules of conduct. I do not have any views at this point on how corrective advertising might be more effectively utilized.

Question 11. Should FTC rules be subject to systematic congressional review? What specific form should such a review take?

Answer 11. The FTC's mandate is broad, and its rules can be far-reaching. Because the Commissioners are not elected officials, I believe it is proper for officials responsible to the electorate to review Commission rules. I have no opinion on the form that such review should take, other than that it should meet Constitutional requirements.

Question 12. Do you believe survey evidence is essential to show injury in rulemakings?

Answer 12. I believe that evidence of injury in rulemaking should be more than anecdotal. The goal is to ascertain that injuries are in fact being caused and are prevalent in the industry. Statistics or surveys are two ways of gathering that evidence. I am not prepared at this point to say for certain that they will be necessary in all cases.

Question 13. Section 3 of S. 1078, the FTC Improvements Act of 1985, makes permanent now temporary restrictions on the Commission's authority to study or inves-

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tigate an agricultural marketing order or certain conduct of an agricultural cooperative. In addition, Section 3 requires the Commission to notify and consult with the Secretary of Agriculture before issuing an antitrust complaint against an agricultural cooperative. What is your opinion of these restrictions?

Answer 13. I question the advisability of creating exemptions from an agency's jurisdiction, particularly as regards mere studies or investigations, unless there is another agency specifically charged with performing the same tasks and which in fact routinely performs them. Because of the supervisory role the Department of Agriculture has over agricultural cooperatives, it may not be out of place for the Commission to consult with the Secretary of Agriculture before issuing an antitrust complaint against an agricultural cooperative.

Question 14. In January 1985, the Justice Department issued its Vertical Restraints Guidelines. What is your opinion of the guidelines?

Answer 14. I have read but have not analyzed the Justice Department's Vertical Restraints Guidelines. My belief is that they reflect modern economic scholarship that, as I mentioned in my answers to questions 2 and 6, suggests there is less potential for harm in vertical integration and restraints than was previously thought. They recommend looking at certain features of vertical arrangements to see whether there is harm or benefits to consumers, a process that would seem to be called for by the Supreme Court's application of the rule of reason to cases involving vertical integration and restraint.

Question 15. In your opinion, would repeal, modification, or selective waiver of section 7 of the Clayton Act be an appropriate response to the increased competition some U.S. firms are experiencing from foreign firms?

Answer 15. As I understand it, the Administration has just proposed amending Section 7 of the Clayton Act to allow certain exemptions from the normal operation of the antitrust laws for corporations particularly hard hit by foreign competition. I have not seen that proposal, I have not read any background papers prepared in connection with it, and I have not talked to anyone in the Administration about it. I believe that the presence of foreign competition can properly be and is now taken into consideration by decisionmakers addressing antitrust issues. I am not now able to say whether this proposal would alleviate the domestic corporations' burdens it is designed to alleviate, or what harm, if any, the proposal runs the risk of creating.

Question 16. Would you support repeal or modification of the McCarran-Ferguson Act so as to allow the Federal Trade Commission and other federal agencies to regulate the business of insurance?

Answer 16. I don't know enough about the current interaction between the Commission and the insurance industry or about what would result from repealing or modifying the McCarran-Ferguson Act to recommend repeal or modification.

PREHEARING QUESTIONS OF THE MINORITY AND THE ANSWERS OF MR. OLIVER

Question 1. Should there be a Federal Trade Commission (FTC)?

Answer 1. Yes. The role of the FTC is to protect the freedom of the market—to police the market in order to correct, where possible, imperfections that may exist—by promoting competition among businesses and by protecting consumers from being deprived of the ability to make adequately informed purchases. The FTC shares antitrust jurisdiction with the Department of Justice. I believe that sharing has worked well over the years, and I have no plans to recommend fundamental reorganization. There is no government agency currently involved in protecting consumers from unfairness and deception the way the FTC does. One of the functions the FTC was originally designed to perform was economic research for the government. There is no reason why private institutions can't share that function, but I suspect the FTC's peculiar situation makes its research particularly useful.

Question 2. Does this agency serve a valid purpose?

Answer 2. Yes, please see my answer to question 1.

Question 3. Does each of the three FTC missions provide a useful function?

Answer 3. Yes, for the reasons expressed in my answer to question 1.

Question 4. Why do you want to be Chairman of the FTC?

Answer 4. A properly functioning market affords consumers their best opportunity to purchase the goods and services they want at the lowest prices. However, the market does not always function properly, and I believe, therefore, that government has a role in policing the market to keep it free of anti-competitive behavior. Too much regulating, however, can be detrimental to the functioning of the market. Government must steer a careful course between too little regulating and too much.

A number of years ago the Commission was somewhat overbearing in its regulating. I would hope to keep it on a proper course between too much and too little.

Question 5. In October of 1985 a report was issued by the Bureau of Economics of the Federal Trade Commission entitled, "Antitrust Policy for Declining Industries." This report concluded that current merger law acknowledges foreign competition. It also concluded that U.S. antimerger laws and horizontal merger guidelines need not be altered for declining industries as current antitrust policy is flexible enough to allow consideration of the efficiency gains that might occur as a result of mergers. The report further concluded that a general policy to liberalize antitrust laws would be ill-advised and that mergers allowed under such a liberalization would not increase employment or the balance in payments. What is your opinion of the conclusion of this report?

Answer 5. I have not read the report, but I believe that the law currently allows decisionmakers to consider the presence and effects of foreign competition, and that they currently do so. Not having seen any studies on this issue, I do not know whether any adjustment in the antitrust laws should be made.

Question 6. What percentage of the FTC budget should be devoted to economic research both in-house and through consultants that is not related to law enforcement work? What do you feel is the role of economic research that is not tied to specific cases in this time of budget cutting? Should the federal government fund non-law enforcement research that could be performed in the academic community?

Answer 6. My understanding is that the FTC was originally established in part to provide economic information to the Congress and the courts. I am not in a position to know how useful that information is considered now or whether providing it should be continued, nor do I know enough about the Commission's budget to comment on how it might be restructured. I don't doubt the academic community can and does provide economic research, but I do not know whether such research would be adequate for the Commission.

Question 7. Should the FTC have jurisdiction over local governments?

Answer 7. Yes, but it should be exercised gingerly. While federalism requires that the federal government respect local governments' regulations, there will be some cases where federal intervention is warranted, where the interests of consumers can, practically, be protected best by the federal government. Exactly where the dividing line is, is often, I suspect, extremely difficult to determine.

Question 8. In your opinion, would an ad be "unfair and deceptive" under the FTC Act if it said "Drive and Drink". Please explain. Does the FTC have authority to ban alcohol advertising? Should such advertising be banned? Does the FTC have authority to require counter advertising in the area?

Answer 8. It is difficult, of course, to answer fully this hypothetical question without knowing the context in which such an ad might appear. An advertisement may be unfair if it will cause substantial and unavoidable harm to consumers, which harm is not outweighed by benefits to consumers. Under that standard, "drink and drive" might be an unfair practice under Section 5 of the FTC Act. There may be some disagreement on exactly what the standard for deception is. Some have said that to be deceptive an advertisement must have a tendency or capacity to mislead a substantial number of consumers in a material respect. Others have said that there must be a representation or omission likely to mislead consumers acting reasonably under the circumstances, which representation or omission must be of information that is material to consumers. I think it would be more difficult to succeed in an action against such an advertisement under either of the deception theories than under an unfairness standard. Under current law, the FTC has no authority to ban by means of a trade regulation rule advertisements because they may be unfair. The FTC does have the authority to ban particular advertisements that it finds deceptive or unfair. The FTC may have the authority to ban all alcoholic beverage advertising if a proper case could be made against such advertisements, but I am inclined to think that such a ban—at least as to smoking or drinking—would be better imposed by Congress. The FTC does have the authority to require counter, or corrective, advertising.

Question 9. In the past, the Distributional Restraints program in the Competition mission at the FTC has received a more significant budgetary decrease than other programs at the FTC. Does this send a signal that these cases are viewed less critically? Does this decrease general deterrence?

Answer 9. I am not familiar with the budget of the FTC or with how the people regulated by the FTC "read" the FTC's budget to be able to answer this question. I do not know whether minor budgetary adjustments have any effect on the level of deterrence.

Question 10. How do you intend to avoid improper ex parte communications?

Answer 10. I will follow whatever rules the Commission my have regarding ex parte communications. I will also ask the General Counsel's Office not only to respond to any concerns I may raise but also to initiate discussions with me when that Office develops concerns about ex parte communications.

Question 11. What is you view as to how the Commission has used its authority under the "unfairness" doctrine with respect to unfair or deceptive acts or practices and unfair methods of competition?

Answer 11. The unfairness jurisdiction is, of course, a major component of the FTC's consumer protection mandate. While I am unaware of any misuse of that mandate in the last few years, I believe it would be useful to codify the meaning of unfairness along the lines suggested in the Senate's proposed authorization legislation.

Question 12. Would you favor a proposal to have FTC unfair method of competition cases tried before Federal judges?

Answer 12. At this point I have no opinion on whether the Commission should be restructured, and no plans to restructure it.

Question 13. Do you think the "State Action Doctrine" applies to the FTC? (To unfair methods of competition and other cases dealing with unreasonable restraints on trade?)

Answer 13. Yes.

Question 14. Are there any areas in which you think the Federal Trade Commission Act should be amended in order to enhance the FTC's ability to enforce its mandate? If so, what are those areas and what changes do you recommend? Are there any areas that should be cut back, transferred, or redefined?

Answer 14. The FTC's mandate is broad, and perhaps not sufficiently clear in some areas. I would support an attempt like that made in the Senate's proposed authorization bill to define the Commission's unfairness jurisdiction. I also believe the Commission should consider whether codifying a definition of deception would be useful. Recently a definition was proposed which, it was claimed, only codified existing law. Objections were raised that the proposed definition differed substantially from current case law. Clearly there is some confusion. For the benefit of those who are bound to obey the law, the confusion should be cleared up. In addition, there are some technical amendments that would probably be useful, such as codifying the Braswell decision and removing the provision that automatically stays Commission cease and desist orders pending appeal. I am not sufficiently familiar with the other statutes the Commission administers or enforces to have an opinion on whether changes in them would be useful.

Question 15. Does FTC enforcement of its operative statutes tend to aid, or does it hinder, the marketplace functioning of small business? Is the Commission moving in the right direction in this regard?

Answer 15. Some of the Commission's enforcement activities are designed to keep the market open to competition. Those activities can tend, I believe, to aid small businesses. Some activities, however, have a different focus, i.e., to protect consumers against unfairness and deception. To the extent those enforcement activities impose requirements on businesses generally, they may tend to disadvantage smaller businesses whose scale of operation may make compliance with such requirements more burdensome.

Question 16. In early 1981, the Administration advocated abolition of the FTC's antitrust jurisdiction, noting the Justice Department's concurrent authority. Do you believe Congress should consider abolition of the FTC's antitrust authority?

Answer 16. The dual jurisdiction seems to have worked well in the past. The FTC has no criminal jurisdiction, so the Department of Justice must handle all criminal matters. The FTC was originally created to provide economic information to Congress and the courts. Some may assert that there are better configurations for federal agencies. It may be that the current arrangement of dual antitrust jurisdiction is not the optimum arrangement, and that if we were to recreate all the federal bureaucracies de novo, a different configuration for handling antitrust matters would result. However, I have no plans to recommend fundamental restructuring.

Question 17. In both 1984 and 1985, record amounts were spent on corporate takeovers—over $120 billion each year. The ten largest corporate takeovers in American history have all occurred since 1980. Has this takeover activity been fueled by FTC antitrust enforcement policy? Do you have an opinion as to how this activity has affected business and the economy in general?

Answer 17. I suspect it is reasonable to assume that at least some of the recent merger activity would not have occurred if the FTC and the Antitrust Division of the Justice Department had been viewed during that time as more hostile to merg-

ers in general than they in fact were. I do not know how this merger activity has affected business and the economy in general.

Question 18. Do you believe survey evidence is essential to show injury in rulemakings?

Answer 18. I believe that evidence of injury in rulemaking should be more than anecdotal. The goal is to ascertain that injuries are in fact being caused and are prevalent in the industry. Statistics or surveys are two ways of gathering that evidence, but I am not prepared at this point to say for certain that they will be necessary in all cases.

Question 19. Do you believe that the cost and benefits of agency action are susceptible to mathematical quantification to the extent that costs can be weighted exactly against benefits?

Answer 19. No, but that does not render useless the attempt to weigh costs against benefits.

Question 20. Should the FTC retain authority to include affirmative rules of conduct in trade regulation rules?

Answer 20. I believe it should.

Question 21. Do you support the per se rule of violation for resale price maintenance cases?

Answer 21. The Supreme Court law on the subject of resale price maintenance is that it is illegal per se, and I am committed to enforcing the law as it currently exists.

Question 22. On horizontal antitrust enforcement, the FTC transition report stated the Commission should: "Concentrate its resources on these horizontal collusion cases where injury is great and where the market will be slow to respond." Do you agree with that?

Answer 22. I believe the statement expresses a valid justification for exercising prosecutorial discretion. I don't understand it as suggesting that other areas where the Commissioners are bound to enforce the law be ignored.

Question 23. Should sizable economic efficiencies be considered as part of the legal analysis of proposed horizontal mergers? As a defense?

Answer 23. Yes. The antitrust laws were enacted to protect consumers. Where an efficiency will produce benefits for consumers, it should be considered along with an assessment of any damages that a merger may cause.

Question 24. The Supreme Court has recognized violations of the Clayton Act involving vertical mergers. Some economists have criticized this approach to the Clayton Act because it does not acknowledge efficiencies that result from such mergers. What is your position on vertical mergers generally?

Answer 24. My understanding is that vertical mergers are no longer thought to present as great a danger to consumers as horizontal mergers do. While the law should be enforced as it currently exists, I am not aware that consideration of efficiencies that result from mergers is improper.

Question 25. Do you support a clarification that the FTC's jurisdiction extends to the State-regulated professions? What about FTC jurisdiction over ethical rules promulgated and supervised by the state courts?

Answer 25. I do not know whether any clarification is necessary regarding the FTC's jurisdiction over state-regulated professions. I believe there is a proper role for state regulation over the professions, but I believe the FTC should have jurisdiction over the business practices, as distinguished from the professional practices, of the professions.

Question 26. How should the FTC evaluate an ad targeted at all consumers but relevant to a vulnerable group as well?

Answer 26. I believe the FTC should be very sensitive to advertisements that can be harmful to a particularly vulnerable group. Whether an advertisement should be regarded as unfair or deceptive would obviously depend on the facts of the case.

Question 27. Do you believe that the Commission should abandon rulemaking or are there instances where rulemaking would be appropriate to deal with a clear industry-wide problem? If you believe rulemaking could be appropriate, please define the circumstances where you would favor such an approach.

Answer 27. My understanding is that industry-wide rulemaking has proved to be more cumbersome than expected. That does not mean rulemaking should be abandoned, but it should be carefully targeted to avoid wasting not only the Commission's resources but also time—the time it takes to do something effective about the offending practices. Without further detailed study, I would be inclined to accept the standards set forth in the Senate's proposed reauthorization legislation.

PREHEARING QUESTIONS OF THE MAJORITY AND THE ANSWERS OF MR. STRENIO

Question 1. What do you perceive to be the major role or mission of the Federal Trade Commission? Is there another entity, public or private, that may be better suited to performing this role or mission?

Answer. The major role of the Federal Trade Commission (FTC) is to promote the welfare of American consumers both through fostering competition in the marketplace and enforcing rules designed to protect consumers when there is market failure. The FTC fulfills its role in a variety of ways, such as law enforcement actions against violations of the antitrust statutes or consumer protection rules, promulgation of trade rules as necessary, and performance of studies and subsequent testimony or reports regarding vital issues involving consumers and competition. In my view, the FTC has a clear statutory mandate to fulfill this role, a capable staff, and valuable agency expertise acquired over the seventy-two years since the passage of the FTC Act. For these reasons, there is no other entity better suited to performing this role.

Question 2. What areas of present FTC activity do you believe should be given the highest priority? Please specify the reasons for your choice.

Answer. The highest priority should be given to activities that have the greatest potential benefit to consumers. In the antitrust area, this means the Commission constantly must be on the alert for illegal actions such as collusion, predation or other conduct likely to harm consumers by reducing industry output and raising prices. In addition, the FTC also must carefully review proposed mergers and joint ventures, and also vertical restraints, to ensure they are in accord with the law and not likely to result in anti-competitive behavior to the detriment of consumers. In the consumer protection area, the FTC should put instances of consumer fraud and deception at the top of the list, with the highest priority for those activities aimed at the most vulnerable and disadvantaged groups in our society. The goal, of course, should be to encourage the dissemination of truthful information which will benefit consumers and the vast majority of honest businesses alike. Finally, the Commission must also bear in mind that "an ounce of prevention is worth a pound of cure," and accordingly continue its various programs to help educate the public and businesses regarding consumer rights and to share FTC expertise with other governmental bodies regarding the competitive and consumer welfare implications of particular marketplace restrictions.

Question 3. In light of the recently ordered sequestration of budget resources pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, are there particular FTC activities that you believe should be redirected or discontinued? Please specify.

Answer. I have not identified particular FTC activities that should be redirected or discontinued at this time. However, in light of the budgetary constraints, it is clear that the FTC needs to continually rethink this question so that the agency makes the most of its resources at all times.

Question 4. Are there any areas in which you think the FTC Act should be amended in order to enhance the FTC's ability to enforce its mandate? If so, what are those areas that should be cut back, transferred, or redefined through legislation? What about other statutes administered or enforced by the FTC?

Answer. I have not identified any such areas at this time. I do think that, especially in light of the circumstances addressed in the previous question, the FTC should continue to review this question and promptly forward to Congress any proposals that may subsequently arise. It may be possible that by working together Congress and the FTC could find ways to improve the agency's use of its power to issue trade regulations, and to provide the public greater certainty regarding the FTC's enforcement standards, but I have no specific suggestions now. Whether or not there are any legislative changes, the FTC always must take care to enforce the laws as written in accord with Congressional intent.

Question 5. Critics have sometimes asserted that there is no need for two antitrust agencies—the Federal Trade Commission and the Justice Department. What is your view?

Answer. I think that because of their different statutory bases, institutional arrangements, staff resources, and agency expertise, the Federal Trade Commission and the Justice Department have complementary roles to play in the enforcement of the antitrust laws. While it is always possible to argue that centralization of all antitrust responsibility in one agency or the other would eliminate a redundancy, it seems more probable that such a move would diminish rather than enhance the quality of antitrust enforcement. It is necessary for both agencies to continue proceeding in a cooperative fashion as demonstrated by the existing liaison agreement

so that the public receives the full benefit of their services, but I see no need at present to change the current structural arrangement.

Question 6. What areas of the FTC's antitrust enforcement authority would you emphasize and which would you deemphasize? Why? In your answer, please specifically address enforcement in the areas of: (a) Conglomerate and vertical mergers; (b) Vertical non-price restrictions; (c) Resale price maintenance; (d) Predatory pricing; and (e) Price discrimination.

Answer. In providing my current thinking about the relative priorities that the FTC should accord to various types of antitrust enforcement, I want to emphasize my view that the Commission has a duty to enforce all antitrust laws. Because the FTC, like all agencies, has limited resources, it makes sense to target those resources first on the most important violations. In my view, the greatest overall potential for harm to consumers is found in horizontal collusion (i.e. agreements to reduce competition among direct competitors) and in illegal efforts to acquire and exercise market power (such as through predation or the transfer of market power upstream or downstream through the use of vertical restraints). Of course, specific enforcement matters must be decided on their own merits, and these general principles in the abstract must adapt to the specific circumstances of factual cases. Congress has rightly charged the FTC with protecting consumer welfare by policing the operation of a vigorously competitive marketplace, and I am committed to upholding that responsibility. Regarding the specific areas mentioned in the question:

(a) *Conglomerate and vertical mergers.* These types of mergers seem less questionable on the surface than horizontal mergers. Nonetheless, the FTC should still carefully review them, particularly when highly-concentrated markets are involved and the proposed merger may remove potential competitors or foreclose entry by new competitors.

(b) *Vertical non-price restrictions, and (c) Resale price maintenance.* Both forms of vertical restraint can harm consumers by restricting competition rather than promoting it. As a general matter, I think they are most likely to be harmful when they are "transmission mechanisms" for horizontal market power. Accordingly, top priority should go to violations where the restraint involves collusion among competitors for the purpose of price-fixing or foreclosing access to a market by competitors.

(d) *Predatory Pricing.* The FTC has a particularly difficult task in this area. The Commission must act forcefully against predatory pricing to prevent the acquisition of market power. Yet the Commission must also make sure it does not mistakenly act against price reductions that are merely the result of vigorous competition which is to the benefit of consumers.

(e) *Price Discrimination.* The FTC clearly has a role to play here in enforcing the existing laws against price discrimination. However, prior to deciding the amount of resources to assign to this area, I would like to review the Commission's non-public enforcement file to gain a better sense of the relative prevalence and impact of price discrimination at present.

Question 7. What authority should the FTC have over state-regulated professionals?

Answer. I think that the FTC should have authority only over the business practices of state-regulated professionals. Determinations of professional competence and standards of practice should reside with the states for their regulation.

Question 8. What statutory changes would you suggest, if any, in the FTC's authority to prohibit deceptive advertising?

Answer. I have no changes to suggest at this time in the FTC's authority to prohibit deceptive advertising. If confirmed, I will further study the question of whether statutory modifications are necessary or desirable.

Question 9. Do you believe the FTC's program in the area of advertising substantiation has been effective? What changes, if any, do you believe should be made in such a program?

Answer. I support the concept of the advertising substantiation program and am inclined to conclude that it has been beneficial to consumers. I will need to examine FTC documents, including the recent review of the program and non-public enforcement information, before reaching a final judgment. Pending that examination, I do not see any need for changes in the program.

Question 10. Should the FTC have authority to require affirmative rules of conduct in trade rules? In orders? Do you have any views as to how corrective advertising might be used more effectively in cases where false and misleading advertisements have been presented to the public?

Answer. The FTC should have authority to require affirmative rules of conduct in trade rules. However, in order to prevent abuse and to make sure that such rules

actually benefit consumers, the FTC should be careful to promulgate such rules only after scrupulously following all the procedural requirements and ascertaining that such a rule is necessary, is beneficial on balance, and is not broader that what is required to end the problem. In light of these requirements, I would be generally reluctant to advance the argument that the Commission should require industry-wide affirmative rules of conduct in orders, although I have an open mind regarding specific questions of law and facts. I do not have any views at present as to how corrective advertising might be used more effectively in cases where false and misleading advertisements have been presented to the public.

Question 11. Should FTC rules be subject to systematic Congressional review? What specific form should such a review take?

Answer. I am sympathetic toward the idea of subjecting FTC rules to systematic Congressional review. My sympathy stems from the recognition that FTC rules can have substantial nationwide impact and are promulgated by unelected officials. However, there are Constitutional issues as to exactly how such a review could be conducted, and questions have also been raised as to whether such a review would be in keeping with Congressional priorities. These are important matters for Congress to resolve. In sum, I think there is much to commend a systematic review but I do not have a recommendation at this time as to the specific form such a review should take.

Question 12. Do you believe survey evidence is essential to show injury in rulemaking?

Answer. I think survey evidence is highly desirable to show injury in rulemakings. When properly done, survey evidence can be very reliable and would tend to provide greater assurance that proposed FTC rules are needed and are correctly focused upon consumer difficulties. However, in my view, survey evidence is not always essential to rulemaking. That assessment must be made in light of a host of factors such as the gravity of the problem addressed, the quality and quantity of other evidence on the record, and the cost in time and money to generate the survey evidence.

Question 13. Section 9 of H.R. 2385, the Federal Trade Commission Authorization Act of 1985, requires the Commission to provide notice to the House Energy and Commerce Committee and the Senate Commerce Committee before intervening in the proceedings of any federal or state agency. What is your opinion of this provision?

Answer. To begin with, the job of a commissioner at the FTC first and foremost is to follow the law as it is written by Congress. Accordingly, regardless of my personal reservations about the need for Section 9, if this provision is enacted into law I will insist that its terms be complied with to the letter. My reservations basically center around the practical observation, based upon my prior service at the FTC, that the sixty-day advance notice will not be practicable in a great many "interventions." This is because the Commission, in my experience, kept a very close watch on interventions and did not authorize them prior to seeing the final version. It was extremely rare for an intervention to be authorized more than a day or two before the deadline. It was also common for there to be fewer than sixty days between an initial request for agency comments and the deadline for receipt of those comments. I note that Section 9 does try to take these practical difficulties into account by its "where practicable" language, but think on balance there may be preferable alternatives (such as having the FTC staff provide a copy of the final version to the relevant committees as soon as filing is authorized by the entire Commission).

Question 14. In January of 1985, the Justice Department issued its Vertical Restraints Guidelines. What is your opinion of the guidelines?

Answer. I have not had the opportunity to review the Justice Department Vertical Restraints Guidelines in sufficient detail to form an opinion on their substantive merit. In any event, may actions at the FTC would be based upon FTC guidelines and policy since the FTC has differing statutory responsibilities than the Justice Department. Nonetheless, I think it is generally useful to both the public and other involved professionals for enforcement agencies to issue guidelines on their activities, and I commend the Justice Department for that effort.

Question 15. In your opinion, would repeal, modification or selective waiver of section 7 of the Clayton Act be an appropriate response to the increased competition some U.S. firms are experiencing from foreign firms?

Answer. I have not formed an opinion at this time as to whether repeal, modification, or selective waiver of section 7 of the Clayton Act would be an appropriate response to the increased competition some U.S. firms are experiencing from foreign firms. It is certainly desirable to review the antitrust laws on a regular basis to see if they should be revised in light of changed economic circumstances or on the basis

of experience acquired over the years. I am aware of the argument that changes in section 7 are desirable to reflect the existence of greater competition from international sources. At the same time, there is an argument that the existing law does make at least some allowances for the existence of foreign competition and whether a U.S. industry is in a state of decline. The question of whether section 7 can be changed to enhance the international competitiveness of U.S. industries without provoking greater detriment in the nature of anti-competitive behavior is a serious matter that I am certain Congress will review thoughtfully. While I have not yet reached my own conclusions on this issue, I will give it careful attention if confirmed and provide a more substantive answer if requested in the future. Of course, any such answer would be dependent in large measure upon the specific nature and wording of any proposal(s) for modification of section 7. This entire question clearly merits further study.

Question 16. Would you support repeal or modification of the McCarran-Ferguson Act so as to allow the Federal Trade Commission and other federal agencies to regulate the business of insurance?

Answer. I am not sufficiently familiar with insurance industry issues at present to conclude that the McCarran-Ferguson Act should be repealed or modified in any way. Of course, unless and until there is a change, the FTC is precluded from regulating the business of insurance, and I will observe that prohibition faithfully.

PREHEARING QUESTIONS OF THE MINORITY AND THE ANSWERS OF MR. STRENIO

Question 1. Should there be a Federal Trade Commission (FTC)?

Answer. Yes, there should be a Federal Trade Commission. The FTC plays a vital role in promoting the welfare of American consumers both by promoting competition in the marketplace through the enforcement of the antitrust laws and also by promulgating (as appropriate) and enforcing rules designed to protect consumers when there is market failure. The FTC also serves a useful function through the preparation and dissemination of information to the public and to governmental bodies that provides a better understanding of marketplace issues.

Question 2. Does this agency serve a valid purpose?

Answer. Yes. As discussed in the previous answer, the agency's role in both the consumer protection and competition areas is valid and vital to the fair and efficient functioning of our national economy.

Question 3. Does each of the three FTC missions provide a useful function?

Answer. All three FTC missions provide a useful function. The work of the Bureau of Consumer Protection is useful to consumers and the vast majority of honest businesses alike in protecting against fraud, deception, and other abuses. The work of the Bureau of Competition is likewise useful in detecting and eliminating instances of anti-competitive behavior that might otherwise impose heavy costs on consumers and competing businesses. The work of the Bureau of Economics is useful in providing support and economic insight for the other two bureaus, as well as spotting developing issues and advocating prophylactic action that could head off a potential threat to consumer welfare and competitive efficiency.

Question 4. Why do you want to be an FTC Commissioner?

Answer. I want to be an FTC Commissioner because I fervently believe in the mission that Congress has given to that agency. The work of the FTC touches upon virtually every citizen, so this job is especially challenging. I have always considered public service to be a high calling in a democracy such as ours, and I think that because of my experience, commitment, and background I can serve the public well as an FTC Commissioner. In any event, I would do my very best to live up to that responsibility if confirmed. Finally, because of my previous service at the FTC, I know that the agency is fortunate to have an exceptionally dedicated and well-qualified staff and I look forward to the opportunity to work together with them again in the public interest.

Question 5. In October of 1985 a report was issued by the Bureau of Economics of the Federal Trade Commission entitled, "Antitrust Policy for Declining Industries." This report concluded that current merger law acknowledges foreign competition. It also concluded that U.S. antimerger laws and horizontal merger guidelines need not be altered for declining industries as current antitrust policy is flexible enough to allow consideration of the efficiency gains that might occur as a result of mergers. The report further concluded that a general policy to liberalize antitrust laws would be ill-advised and that mergers allowed under such a liberalization would not increase employment or the balance in payments. What is your opinion of the conclusion of this report?

Answer. I would want to do additional research before forming my opinion about the report's conclusion. Moreover, this is a very complex subject with a broad array of factors that need to be taken into account in deciding what consequences should flow from particular conclusions. For instance, even if one were to agree totally with the report's conclusion, it would still be possible to argue for changes in the current merger law that would clarify its implementation and codify further the degree to which "international factors" should be considered in its application. However, regardless of my ultimate conclusion on this issue, I think the report itself reflects careful study and merits attention. This kind of work by the Bureau of Economics is an example of the sort of "issue spotting" that I mentioned in my answer to question number three above, and could also be cited as an example of justified in-house research that is not related to a specific law enforcement case.

Question 6. What percentage of the FTC budget should be devoted to economic research both in-house and through consultants that is not related to law enforcement work? What do you feel is the role of economic research that is not tied to specific cases in this time of budget cutting? Should the federal government fund non-law enforcement research that could be performed in the academic community?

Answer. Without access to all the FTC budget documents and non-public enforcement information, I can not venture a percentage estimate. However, as discussed in the previous answer, there are instances where the FTC may have valid reasons to advance economic research not tied to a specific law enforcement case but, as specified in Section 6 of the FTC Act, having a bearing upon an anticipated set of cases, or industry patterns, or general law enforcement practices. Without doubt, any such research should be carefully reviewed by the Commission to make sure it is justified both absolutely and relatively in this time of budget cutting. Similarly, I would be very skeptical of non-law enforcement research that would otherwise be timely performed in the academic community unless there is a compelling justification. The FTC definitely should not fund research unless it is related to the agency's mission.

Question 7. Should the FTC have jurisdiction over local governments?

Answer. I think it is in accord with both the principles of federalism and of sound public policy for the FTC to be very cautious in invoking pre-emption of local government actions. The FTC ought not to challenge local decisions unless it is clearly necessary to protect consumers and uphold federal policy. As a general matter, I think the approach Congress adopted in the Local Government Antitrust Act of 1984 is a sound way to reconcile local and federal interests in the area of antitrust law enforcement. That approach protects local citizens against ruinous damage awards, yet also maintains the federal ability to protect consumers and competition nationwide by obtaining injunctions against anti-competitive activity outside the authority of local governments.

Question 8. In your opinion, would an ad be "unfair and deceptive" under the FTC Act if it said "Drive and Drink". Please explain. Does the FTC have authority to ban alcohol advertising? Should such advertising be banned? Does the FTC have authority to require counter advertising in the area?

Answer. It is not possible to definitively answer a question such as this one, because all such cases turn upon the totality of the facts involved. Nonetheless, for this question as with all the others, I will do my best to answer, bearing in mind that I have not reached a final judgment and am open to de novo consideration of all such cases that may come before me at the FTC.

An ad that just said "Drive and Drink" would certainly raise serious questions for me under Section 5 of the FTC Act that defines advertisements as unfair if they will cause substantial and unavoidable injury to consumers. An argument could also be made that such an ad is deceptive under FTC guidelines as a material misrepresentation, omission or practice likely to mislead consumers interpreting the ad in a reasonable manner. Thus, it is possible the FTC could ban such an ad under either theory, depending upon the rest of the facts.

As to the generic questions, the FTC does not have the authority to ban alcohol advertising by proposing a trade regulation rule on an unfairness theory. The Commission may have greater authority under a deception theory, although such an approach would obviously raise Constitutional questions regarding commercial speech even if all the other requirements for action were met. I would need to review a complete record before definitively saying whether all alcohol advertising should be banned. Such a question obviously involves a need for credible evidence in many areas, including the link, if any, between alcohol advertising and the abuses of alcohol, such as drunk driving, that do so much harm. If such a showing were made, Congress might well choose to take the lead on this issue rather than awaiting an

FTC determination. As this is all hypothetical, I can only conclude by saying I would proceed with caution and be properly deferential to the will of Congress.

Finally, the FTC does have authority to require counter advertising in the area upon a proper showing.

Question 9. In the past, the Distributional Restraints program in the Competition mission at the FTC has received a more significant budgetary decrease than other programs at the FTC. Does this send a signal that these cases are viewed less critically? Does this decrease general deterrence?

Answer. I am not familiar with the budgetary resources provided for the Distributional Restraints program, nor am I familiar with their non-public enforcement efforts. In the absence of these facts, I am unable to conclude whether the resource allocation is appropriate, too high, or too low. The signal sent, and the effect on general deterrence, depend upon that conclusion. If confirmed, I will investigate this question further and take steps to rectify the situation if my conclusion is unfavorable.

Question 10. How do you intend to avoid improper ex parte communications?

Answer. I will follow scrupulously the Commission's rules, and will consult the General Counsel for advice on any specific questions that may arise. I am sensitive to the need to avoid any such improper communications and will guard against them.

Question 11. What is your view as to how the Commission has used its authority under the "unfairness" doctrine with respect to unfair or deceptive acts or practices and unfair methods of competition?

Answer. This is a very broad question and I want to review the FTC's record in greater detail before giving an extensive answer. As a general matter, in light of the great discretion that Congress has delegated to the FTC in this area, I think it would be useful to continue exploring ways in which this delegation can be refined and clarified so that the agency does not inadvertently overstep its bounds. This need is probably greater in the area of unfair or deceptive acts or practices than in the area of unfair methods of competition since the latter has a more developed body of case law to provide additional guidance.

Question 12. Would you favor a proposal to have FTC unfair method of competition cases tried before Federal judges?

Answer. I am not aware of any current problems that would make this a desirable step, but will investigate the question further if I am confirmed.

Question 13. Do you think the "State Action Doctrine" applies to the FTC? (To unfair methods of competition and other cases dealing with unreasonable restraints on trade?)

Answer. I think that this doctrine logically does apply to the FTC.

Question 14. Are there any areas in which you think the Federal Trade Commission Act should be amended in order to enhance the FTC's ability to enforce its mandate? If so, what are those areas and what changes do you recommend? Are there any areas that should be cut back, transferred, or redefined?

Answer. I have not identified any such areas at this time. I do think that, especially in light of the budget constraints confronting the agency, the FTC should continue to review this question and promptly forward to Congress any proposals that may subsequently arise. It may be possible that by working together Congress and the FTC could find ways to improve the agency's use of its power to issue trade regulations and to provide the public greater certainty regarding the FTC's enforcement standards, but I have no specific suggestions now. Whether or not there are any legislative changes, the FTC always must take care to enforce the laws as written in accord with Congressional intent.

Question 15. Does FTC enforcement of its operative statutes tend to aid, or does it hinder, the marketplace functioning of small business? Is the Commission moving in the right direction in this regard?

Answer. Although I am not familiar with any empirical studies on this question, I believe that FTC enforcement of its operative statutes tends to aid the marketplace functioning of small business. After all, small business stands to lose from anti-competitive practices, from the unsupported imposition of barriers to entry into new markets, and from anti-consumer practices that could make consumers more wary generally and reluctant to deal with smaller or lesser-known entities in particular. The FTC's antitrust and consumer protection enforcement actions, its consumer and competition advocacy program, and its education efforts all should work together to the benefit of small business. On this basis, I think the Commission is moving in the right direction in this regard, subject to a review of the FTC's non-public enforcement actions.

Question 16. In early 1981, the Administration advocated abolition of the FTC's antitrust jurisdiction, noting the Justice Department's concurrent authority. Do you believe Congress should consider abolition of the FTC's antitrust authority?

Answer. I think it is always appropriate for Congress to consider all aspects of the FTC. However, I would argue against the abolition of the FTC's antitrust authority.

In my view, the Federal Trade Commission and the Justice Department have complementary roles to play in the enforcement of the antitrust laws. After all, the two agencies have different statutory bases, institutional arrangements, staff resources, and agency expertise. While it is always possible to argue that centralization of all antitrust responsibility in one agency or the other would eliminate a redundancy, it seems more probable that such a move would diminish rather than enhance the quality of antitrust enforcement. It is necessary for both agencies to continue proceeding in a cooperative fashion, as demonstrated by the existing liaison agreement, so that the public receives the full benefit of their services, but I see no need at present to change the current structural arrangement.

Question 17. In both 1984 and 1985, record amounts were spent on corporate takeovers—over $120 billion each year. The ten largest corporate takeovers in American history have all occurred since 1980. Has this takeover activity been fueled by FTC antitrust enforcement policy? Do you have an opinion as to how this activity has affected business and the economy in general?

Answer. I think that corporate takeovers occur in response to a complex set of economic factors and policy considerations (such as the general state of the economy, the specific circumstances of the acquiring and acquired companies, technological innovation, management quality, the availability of capital, the ability to generate efficiencies, shifts in consumer preferences, tax policy, regulatory policy, and antitrust enforcement policy to name a few). At this time I have no way of judging to what extent, if any, recent FTC antitrust enforcement policy has fueled takeover activity since 1980. Since there are many valid reasons for mergers (such as a means of increasing efficiency and promoting consumer welfare thereby), in the absence of anti-competitive effects such activity holds the promise of helping consumers, business, and the economy in general. However, I need to review the entire area in depth before forming a firm opinion on whether this activity has been good, bad, or indifferent overall for consumers, business, and the economy.

Question 18. Do you believe survey evidence is essential to show injury in rulemakings?

Answer. I think survey evidence is highly desirable to show injury in rulemakings. When properly done, survey evidence can be very reliable and would tend to provide greater assurance that proposed FTC rules are needed and are correctly focused upon consumer difficulties. However, in my view, survey evidence is not always essential to rulemaking. That assessment must be made in light of a host of factors such as the gravity of the problem addressed, the quality and quantity of other evidence on the record, and the cost in time and money to generate the survey evidence.

Question 19. Do you believe that the cost and benefits of agency action are susceptible to mathematical quantification to the extent that costs can be weighted exactly against benefits?

Answer. No. Although, to the extent they can be measured, the costs and benefits of agency action are useful information in establishing FTC priorities, it is not usually possible to specify them with such mathematical precision.

Question 20. Should the FTC retain authority to include affirmative rules of conduct in trade regulation rules?

Answer. The Ftc should retain authority to include affirmative rules of conduct in trade regulation rules. However, in order to prevent abuse and make sure that such rules actually benefit consumers, the FTC should be careful to promulgate such rules only after scrupulously following all the procedural requirements and ascertaining that such a rule is necessary, is beneficial on balance, and is not broader than what is required to end the problem.

Question 21. Do you support the per se rule of violation for resale price maintenance cases?

Answer. I think that in accord with the *Dr. Miles* case, resale price maintenance is illegal per se. Since that is the law, I would enforce it as such. It seems to me that resale price maintenance is most likely to be injurious to consumers whenever it is being used in connection with horizontal collusion (as, for example, a way for manufacturers to police a price-fixing arrangement, or as the result of pressure from a dealer cartel trying to restrict competition from discounters). There is, however, a body of thought that resale price maintenance may at times be pro-competitive and promote consumer welfare. There is also an argument that antitrust law is internal-

ly inconsistent because of the relatively relaxed approach toward non-price vertical restrictions taken by the Supreme Court in the *GTE Sylvania* decision. These are important issues that deserve further exploration, as does the argument that anything less than per se illegality would have the de facto effect of legalizing all resale price maintenance because of the cost and delay entailed in rule of reason cases.

Question 22. On horizontal antitrust enforcement, the FTC transition report stated the Commission should: "Concentrate its resources on these horizontal collusion cases where injury is great and where the market will be slow to respond." Do you agree with that?

Answer. Yes. It seems to me to be a matter of common sense to give the highest priority to enforcement where the harm is most severe and least likely to dissipate in the absence of governmental action. This does not mean other violations should be ignored, only that in utilizing scarce resources it is prudent to set priorities carefully in accord with the severity of the offense.

Question 23. Should sizable economic efficiencies be considered as part of the legal analysis of proposed horizontal mergers? As a defense?

Answer. I think it is reasonable to take sizable economic efficiencies into account in reviewing proposed horizontal mergers. However, the existence of efficiencies alone should not be determinative. Rather, the totality of circumstances, including expected anti-competitive effects, must control the final decision. Care should also be taken to examine closely claims of efficiencies to determine whether they are warranted.

Question 24. The Supreme Court has recognized violations of the Clayton Act involving vertical mergers. Some economists have criticized this approach to the Clayton Act because it does not acknowledge efficiencies that result from such mergers. What is your position on vertical mergers generally?

Answer. As a general matter, I think that vertical mergers are less likely to present serious anti-competitive concerns than horizontal mergers. However, some vertical mergers can cause anti-competitive problems of a horizontal nature (particularly when highly-concentrated markets are involved) by removing potential competitors, foreclosing entry by new competitors, facilitating collusion, or, in the case of regulated entities, facilitating the evasion of rate regulation. For these reasons, the FTC should continue to carefully review proposed vertical mergers in order to avoid these anti-competitive consequences.

Question 25. Do you support a clarification that the FTC's jurisdiction extends to the State-regulated professions? What about FTC jurisdiction over ethical rules promulgated and supervised by the state courts?

Answer. I think that the FTC should have authority only over the business practices of state-regulated professionals. Determinations of professional competence and standards of practice should reside with the states for their regulation. Aside from any state action issues, I am inclined to think that this is the proper line to draw in general and would be hesitant to make distinctions on the basis of what particular body is responsible for a state's regulation of professions.

Question 26. How should the FTC evaluate an ad targeted at all consumers but relevant to a vulnerable group as well?

Answer. Again, since this is a hypothetical question, I would need to examine all the facts regarding a particular advertisement to make a reasoned determination. Nonetheless, in principle I think that the FTC should be sensitive to the effect an ad that is relevant to a vulnerable group would have upon that group, even though the ad is targeted to a broader audience. The facts would have to control the outcome, but I would certainly pay close attention to the needs of vulnerable groups for protection against unfair or deceptive advertising.

Question 27. Do you believe that the Commission should abandon rulemaking or are there instances where rulemaking would be appropriate to deal with a clear industry-wide problem? If you believe rulemaking could be appropriate, please define the circumstances where you would favor such an approach.

Answer. I think the Commission should not abandon rulemaking because it can be an appropriate and powerful tool under certain conditions. Rulemaking would seem particularly desirable when the FTC encounters an important problem resulting from an unlawful practice that is widespread within an industry for which there is no less intrusive solution, and for which the agency can fashion a remedy that is beneficial on balance and carefully crafted not to be overly broad. I also think that the Commission can improve its performance and serve the public by exercising tighter management on rulemakings so that they are more efficient (i.e. that they are completed more rapidly and generate higher-quality records). The FTC would also be well-advised to coordinate more closely with Congress, especially prior to ini-

tiating a rulemaking, to reduce the chance that extensive agency resources would be committed to a rulemaking that would not pass appropriate Congressional scrutiny.

POSTHEARING QUESTIONS OF THE MAJORITY AND THE ANSWERS OF MR. OLIVER

Question 1. In a speech last year, Attorney General Meese commented that agencies with enforcement powers are, properly, part of the Executive Branch and not independent. A recent lawsuit also questioned the FTC's constitutionality, because the agency is not part of the Executive Branch but exercises "executive" powers. What is your view of the constitutionality of the Act?

Answer 1. The constitutionality of the independent agencies has been a subject of debate for a number of years. That debate has greatly increased in intensity in recent months with the occurrence of three events: the filing of an attack on the constitutionality of the Federal Trade Commission by certain insurance companies that are the respondents in an action by the FTC, *Ticor Title Insurance Company, et al. v. Federal Trade Commission, et al.*, C.A. No. 85-3089 (D.D.C.); the decision of the Court of Appeals for the District of Columbia in the recent test of the constitutionality of the Gramm-Rudman-Hollings deficit reduction act; and the recent comments of the Attorney General. I am and have been aware of the debate over the constitutionality of the independent agencies, but I am not and have not been a student of that debate. I have studied neither the briefs of the insurance companies nor the brief of the FTC in the *Ticor* case. Without extensive research into the question raised, therefore, I cannot reach a conclusion on the issue—and have not done so. Moreover, since the Commission has issued an administrative complaint against the insurance companies, which is currently scheduled for hearing before an Administrative Law Judge, I may be required to hear that case as a sitting Commissioner. I believe, therefore, it would be inappropriate for me to speculate on the issues presented by that case lest I be required to recuse myself for having seemed to arrive at a conclusion without proper consideration of the arguments.

Question 2. As you know, the Administration recently recommended changes to section 7 of the Clayton Act. Do you intend to enforce section 7 as it is currently written, pending Congressional action on the Administration's proposal?

Answer 2. Yes.

Question 3. In your answers to the prehearing questions, you indicated support for the Justice Department's vertical restraints guidelines. Do you believe the FTC should follow the guidelines?

Answer 3. In my answers to the prehearing questions I sought to indicate that I believe the Justice Department's vertical restraints guidelines are a useful reflection on the current state of the law regarding vertical restraints as expressed by the Supreme Court in *Continental T. V., Inc., et al. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The guidelines themselves state that they focus primarily on only two major categories of restraints, territorial and customer restraints, and exclusive dealing arrangements, though they also discuss tying arrangements. They are only guidelines, and they attempt to formulate a method of analyzing cases that are subject to the rule of reason that the *GTE Sylvania* case requires. That case holds that vertical restraints (other than resale price maintenance) are to be judged by the rule of reason. "When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason...." Some commentators have suggested that that rule is not the clearest one to follow, under which circumstances guidelines, for determining what practices produce the anticompetitive effects the Court referred to, do not seem out of place. I will follow the law as it has been expressed by the Supreme Court, but I do not understand the Justice Department's guidelines as suggesting otherwise.

Question 4. In answer to one of the prehearing questions, you indicated that "evidence of injury in rulemaking should be more than anecdotal." Do you believe the FTC Act should be amended to require a greater amount of evidence or a specific type of evidence in rulemaking proceedings?

Answer 4. There has been much debate on the efficiency of the rulemaking procedure, with critics suggesting that the evidence becomes quite stale. I believe that courts have not found that the staleness of a record is grounds for declaring a rule invalid. But the subject is certainly one worth of study. My answer to the prehearing question was meant to indicate what I, as a Commissioner, would be inclined to look for; it was not meant to imply that I have concluded that a statutory change is required.

POSTHEARING QUESTION OF SENATOR PACKWOOD AND THE ANSWER OF MR. OLIVER

Question. You are a member of the Metropolitan Club which excludes women from its membership. What is your position on this admission policy which excludes women?

Answer. My position on the admissions policy of the Metropolitan Club is that the policy should not be interpreted as being anti-women. I do not view my membership in that club as anti-women in any way, and assume the President of the United States doesn't view such a policy as anti-women either. A number of members of the Metropolitan Club have served prominently in Republican and Democratic Administrations. It is my understanding that a number of members of the club currently serve in the United States Congress. One member of the club is a prominent black clergyman whose commitment to civil rights is unimpeachable. I doubt any of them views the club's policy as anti-women. In my judgment, therefore, membership in the Metropolitan Club does not disqualify a person from federal service. Nevertheless, if a consensus develops that senior officials in government should adopt other criteria, then, of course, I would be willing to resign.

POSTHEARING QUESTIONS OF SENATOR GOLDWATER AND THE ANSWERS OF MR. OLIVER

Question 1. Do you intend to review independently FTC staff recommendations made to the Commission or do you believe staff recommendations should generally be followed?

Answer 1. I believe the Commission, not the staff, should run the Commission, and I believe the views of the Commission should be the views of the Commissioners, not, except coincidentally, those of the staff. Nevertheless, I suspect that the matters the Commission is required to pass on—in one respect or another—are are too numerous for all of them to be examined individually by the Commissioners. I would intend to review independently all major staff recommendations and in addition see to it that recommendations it is not possible to review routinely are routinely reviewed by people who are likely to follow the Commissioners' directions.

Question 2. Do you believe it is proper, more than two years after the fact, to assess a large civil penalty for technically missing an FTC-ordered divestiture deadline when (i) the ordered action was completed in good faith at the earliest practical moment, (ii) the action was approved by the Commission, and, (iii) the agency made no attempt to act when the deadline was missed and the case was pending?

Answer 2. On these facts it would not seem to be proper to assess a large civil penalty. However, some action may be required by the law, notwithstanding the delay, under which circumstances the law enforcement agency may have no option but to proceed with an assessment.

Question 3. Do you believe generally that there should a cap on civil penalties when the penalties are proposed to be assessed more than two years after a private institution has completed its good faith compliance with an FTC order?

Answer 3. If satisfactory statutory definitions could be devised for permitting exceptions to the general rule, the proposal might well have merit.

POSTHEARING QUESTION OF SENATOR HOLLINGS AND THE ANSWER OF MR. OLIVER

Question 1. In 1984, the Congress passed amendments to the Textile Fiber Product Identification Act and the Wool Products Labeling Act of 1939. These amendments required a "Made in U.S.A." Label for American-made goods. There have been allegations that garments are being labeled "Made in U.S.A.", but are really imported garments. There have also been press reports of other irregularities concerning labeling under these Acts. Can we expect vigorous oversight by the FTC of this program; and prosecution, where warranted?

Answer 1. Yes, consistent with meeting the Commission's other obligations.

POSTHEARING QUESTIONS OF SENATOR FORD AND THE ANSWERS OF MR. OLIVER

Question 1. If your appointment to the Federal Trade Commission is confirmed, do you intend to follow the Department of Justice Merger Guidelines and the FTC Statement on Horizontal Mergers and attack those mergers which violate the guidelines set forth in those two documents?

Answer. I understand both the Department of Justice Merger Guidelines and the FTC Statement on Horizontal Mergers as being statements of those agencies concerning the proper method of analyzing cases in view of the current law—statutory

and case—on mergers. I intend to follow the law, and believe the two statements will be useful in analyzing such cases as may come before the Commission.

Question 2. Section 3.11(c) of the Department of Justice Merger Guidelines states that if, in an acquisition situation, "the increase in the HHI (Herfindahl-Hirshman Index) exceeds 100 and the post merger HHI substantially exceeds 1800, only in extraordinary cases will such factors (other than market share data) establish that the merger is not likely substantially to lessen competition." Given this statement of policy in the Department of Justice Guidelines and the policy of the Federal Trade Commission in its Statement on Horizontal Mergers that the Justice Department Guidelines will be given "considerable weight by the Commission and its staff in their evaluation of horizontal mergers," do you believe that the Commission should challenge an acquisition which results in an HHI of over 2,800 an an increase in the HHI of 400 points?

Answer. Yes, except in extraordinary cases.

Question 3. Do you intend to enforce Section 7 of the Clayton Act as it is currently written and applied pending Congressional action on the Administration's modification proposal?

Answer. Yes.

Question 4. At what level will line of business staff be maintained this fiscal year? Is it possible for outside researchers to use this data without the aid of professional FTC staff?

Answer. I am not in a position to answer questions concerning FTC budget matters. I do not know whether it is possible for outside researchers to use line-of-business data without the aid of the professional staff at the FTC.

Question 5. What are your views on the theory articulated in the *Ticor* case that the FTC is unconstitutional because its members cannot be fired by the President?

Answer. The constitutionality of the independent agencies has long been a subject of debate for a number of years. That debate has greatly increased in intensity in recent months with the occurrence of three events: the filing of an attack on the constitutionality of the Federal Trade Commission by certain insurance companies that are the respondents in an action by the FTC. *Ticor Title Insurance Company, et al. v. Federal Trade Commission, et al.*, C.A. No. 85-3089 (D.D.C.); the decision of the Court of Appeals for the District of Columbia in the recent test of the constitutionality of the Gramm-Rudman-Hollings deficit reduction act; and the recent comments of the Attorney General. I am and have been aware of the debate over the constitutionality of the independent agencies, but I am not and have not been a student of that debate. I have studied neither the briefs of the insurance companies nor the brief of the FTC in the *Ticor* case. Without extensive research into the question raised, therefore, I cannot reach a conclusion on the issue—and have not done so. Moreover, since the Commission has issued an administrative complaint against the insurance companies, which is currently scheduled for hearing before an Administrative Law Judge, I may be required to hear that case as a sitting Commissioner. I believe, therefore, it would be inappropriate for me to speculate on the issues presented by the case lest I be required to recuse myself for having seemed to arrive at a conclusion without proper consideration of the arguments.

Question 6. Do you believe that Congress' sole purpose in enacting the antitrust laws was to promote economic efficiency among businesses? If not, what other purposes or policies underlie these laws? Are there any social policies involved? Do you believe, as a matter of policy, that we should tolerate some inefficiency if necessary to preserve a large number of competitors, especially small businesses?

Answer. The precise purpose of the antitrust laws has long been a subject of debate, with, as I understand it, the Supreme Court's view shifting over time. Some commentators have stated that Congress designed the antitrust laws, among other purposes, to preserve a deconcentrated industrial structure, to disperse economic power, to foster individual economic freedom, to encourage local ownership of business, and to lessen inequalities in economic conditions. Some commentators have read the Supreme Court's decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), as establishing that efficiency was the sole goal of the antitrust laws. Both sets of views may be consistent with maximizing consumer welfare in the long run. Of course, it may depend on which law is being discussed: the Sherman Act and the Clayton Act, or the Robinson-Patman Act. The problem with admitting some inefficiency in the enforcement of the antitrust laws is determining how much inefficiency is sufficient. It is generally conceded, I believe, that a number of firms with market power that conspire to monopolize a market—restrict output and raise prices—can create an umbrella price. As a result, a small company, too small to enjoy the economies of scale necessary to produce the product at a "proper" competitive price, could, because of the umbrella price created by the monopolies, stay

in business producing the product at a supra-competitive price but a sub-umbrella price. Tolerating such inefficiencies may increase the number of small businesses, but at the expense of consumers who have to pay the supra-competitive price. If it is Congress's desire to have factors other than efficiency considered in antitrust matters, I believe it should so state, and in a most detailed manner. The range of non-efficiency criteria is, I suspect, vast, and antitrust law would be difficult to comprehend without such detailed guidance.

POSTHEARING QUESTIONS OF SENATOR MCCLURE AND THE ANSWERS OF MR. OLIVER

Mr. Oliver, I am concerned about the policy behind an enforcement proceeding initiated by the Commission last year against six title insurance companies, and which continues. Despite the McCarran-Ferguson Act, which is clearly designed to keep the federal government out of the regulation of insurance, and specific authorization for rating bureaus by 13 states, the Commission brought an action charging that the use of rating bureaus by the title companies violated section 5 of the FTC Act. Before the FTC initiated its proceedings, I am told that the title companies offered to voluntarily withdraw, and be bound by a State of Enforcement Policy, if the FTC would not file its complaint. The companies took this position not because they believed their conduct was inappropriate—to the contrary, membership in these bureaus was fully authorized and sanctioned under state law. Instead, the companies were concerned about private antitrust litigation which was sure to follow the FTC enforcement action.

Question 1. The offer by the title insurance companies would have granted the FTC the injunction relief it was seeking without the expense of litigation. Do you think it advisable that the FTC pursue a case which it had won before the action was filed?

Answer 1. There have been a number of occasions on which the FTC has prosecuted a corporation for activities which the corporation has ceased to engage in. The FTC has taken such action in order to preclude the corporation from engaging in such activity in the future. To the extent the activity engaged in did (or may have) violated the antitrust laws, private parties are allowed by current law to seek certain remedies. (Please note that I am not making a judgment on the merits of the case you are referring to. I am aware of the case from reading the newspapers and trade publications, but I have not discussed the facts of the case with anyone at the FTC and I am not familiar with the facts beyond such reading.) I believe it has been the policy of the FTC to proceed with certain actions even though the respondent was willing to settle, and not to have proceeded with the case against the six title insurance companies would have been a departure from this policy. I am not prepared at this point to state that that policy is inadvisable—but I am entirely willing to make my own assessment of the practice if my appointment to the Commission is confirmed.

Question 2. At the time the FTC brought the case, an antitrust case involving the use of state-sanctioned rating bureaus in the trucking industry was before the Supreme Court. The facts and legal arguments in the case were virtually identical to the title insurance proceeding and a positive ruling by the Court would have been dispositive. In similar circumstances, wouldn't you think it advisable for the Commission to wait until after a Supreme Court decision right on point?

Answer 2. The Commissioners are charged with enforcing the law as they find it at the time of an alleged violation. I am not sure it would be proper for them to postpone initiating an enforcement action on the basis of speculation on how the law might be changed by the Supreme Court.

Question 3. It appears to me that the Commission brought the enforcement action in an attempt to narrow the scope of the McCarran-Ferguson Act, despite repeated expressions of Congressional support for the Act. For example, in 1980, the Congress adopted an amendment to the FTC Act which specifically precluded the FTC from conducting investigations of the business of insurance. In adopting this provision, the conferees stated "The Conferees wish to indicate their strong reaffirmation of the basic policy of the McCarran-Ferguson Act: that the business of insurance is to be regulated by the state. If the Commission believes that the McCarran Act should be amended, and a broader federal role established with respect to the regulations of insurance, the FTC should exercise the authority it has to propose such legislation as it considers appropriate." In light of this strong policy statement, can I have your pledge to personally examine the title insurance proceeding, and refrain from attempting to set through enforcement actions the broad policy objectives more appropriately left to Congress?

Answer 3. You have my pledge that if the action involving the six title insurance companies comes before me, I will consider all appropriate facts of the case and do my best to decide the case in accordance with the law passed by the Congress.

Question 4. Do you think the FTC has sufficient authority to carry out its mandate from the Congress, or do you think it is necessary to expand their current power? In addition, should tighter controls be placed on FTC authority requiring a majority of the Commission to approve action, such as the title insurance action, before departments would be allowed to initiate such action? In general, do you think the FTC authority should be expanded, reduced, or remain the same?

Answer 4. I am not aware of areas in which the FTC lacks authority to carry out its mandate from Congress. I am not sufficiently familiar with the practices of the Commission to know whether controls on the staff need to be tightened or loosened. I believe that the Commission should determine policy, and that the staff exists to implement those determinations. It is my view that close management controls should exist over initiation of investigations.

POSTHEARING QUESTIONS OF THE MAJORITY AND THE ANSWERS OF MR. STRENIO

Question 1. In a speech last year, Attorney General Meese commented that agencies with enforcement powers are, properly, part of the Executive branch and not independent. A recent lawsuit also questioned the FTC's constitutionality, because the agency is not part of the Executive branch but exercises "Executive" powers. What is your view of the constitutionality of the FTC?

Answer. Since this is a question that may well come before me at the FTC, and since I am not currently versed in all the relevant arguments, I can only answer in the most general terms based upon my understanding at present. I think it is fair to state that until recently there was a widespread sense that the question of the FTC's constitutionality had been resolved in the affirmative by the Supreme Court in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935). If this is correct, then any contemporary legal challenge would logically have to seek either to distinguish or secure reversal of the precedent established fifty-plus years ago in *Humphrey's Executor.* Obviously, this is a matter of great importance. I will study it carefully if confirmed, and then reach and express my conclusions at the earliest appropriate time.

Question 2. As you know, the Administration recently recommended changes to Section 7 of the Clayton Act. Do you intend to enforce Section 7 as it is currently written, pending Congressional action on the Administration's proposal?

Answer. The current Section 7 of the Clayton Act is the law, and I intend to enforce it as such unless and until amendments are enacted.

Question 3. In your answers to the prehearing questions, you indicated support for the Justice Department's Vertical Restraints Guidelines. Do you believe the FTC should follow guidelines?

Answer. As a general matter, in the absence of legal requirements, or other compelling reasons, I think that the FTC should not bind itself formally to following guidelines except those that have been issued (or subsequently adopted or explicitly acknowledged or incorporated by reference) by the FTC. Of course, since the FTC and the Justice Department have antitrust enforcement responsibilities that overlap to some extent, I think it behooves each agency to carefully consider (but not necessarily follow in all regards) any guidelines issued by the other. Regarding the Justice Department's Vertical Restraints Guidelines in particular, I have not had the opportunity to review them in sufficient detail to form an opinion on their substantive merit.

POSTHEARING QUESTIONS OF SENATOR GOLDWATER AND THE ANSWERS OF MR. STRENIO

Question 1. Do you intend to review independently FTC staff recommendations made to the Commission or do you believe staff recommendations should generally be followed?

Answer. I intend to review independently FTC staff recommendations made to the Commission. My decision as to whether or not follow any specific FTC staff recommendation will be made according to my assessment of the quality of the recommendation in that particular case.

Question 2. Do you believe it is proper, more than two years after the fact, to assess a large civil penalty for technically missing an FTC-ordered divestiture deadline when (i) the ordered actions was completed in good faith at the earliest practi-

cal moment, (ii) the action was approved by the Commission, and, (iii) the agency made no attempt to act when the deadline was missed and the case was pending?

Answer. It is always difficult to provide a detailed answer to hypothetical questions such as this one, because the answer is dependent upon the totality of facts and the legal conclusions to be drawn from them. Without knowing a complete record for this hypothetical matter, I can only state in the abstract that I would be inclined to think the factors listed could be relevant to the Commission's determination. Whether or not those factors would be determinative would have to depend upon whether they are outweighed by other relevant factors (if any). Of course, it is always essential for the Commission to give careful consideration to the entire record prior to deciding whether to assess a civil penalty and, if so, how large that penalty should be.

Question 3. Do you believe generally that there should be a cap on civil penalties when the penalties are proposed to be assessed more than two years after a private institution has completed its good faith compliance with an FTC order?

Answer. I think that the size of all civil penalties proposed to be assessed should be subjected to a thorough analysis by the Commission. I do not know now whether the FTC should adopt a cap to cover these, or other, hypothetical circumstances, but will look into the appropriations of such an action if I am confirmed. Whether or not such a cap is adopted, I always will consider carefully all the relevant circumstances in specific cases that may come before me.

POSTHEARING QUESTION OF SENATOR HOLLINGS AND THE ANSWER OF MR. STRENIO

Question 1. In 1984, the Congress passed amendment to the Textile Fiber Products Identification Act and the Wool Products Labeling Act of 1939. These amendments required a "Made in the USA" lable for American-made goods. There have been allegations that garments are being labeled "Made in the USA," but are really imported garments. There have also been press reports of other irregularities concerning labeling under these Acts. Can we expect vigorous oversight by the FTC of this program; and prosecution where warranted?

Answer. Although I am not now fully aware of all the circumstances, and cannot unilaterally speak for the FTC as a whole, I do think this matter deserve attention. To the extent the FTC has enforcement responsibility under these (or other) Acts, it seems to me that the FTC definitely should—consistent with its other responsibilities—conduct vigorous oversight of this program and take legal action where warranted.

POSTHEARING QUESTIONS OF SENATOR FORD AND THE ANSWER OF MR. STRENIO

Question 1. If your appointment to the Federal Trade Commission is confirmed, do you intend to follow the Department of Justice Merger Guidelines and the FTC Statement on Horizontal Mergers and attack those mergers which violate the guidelines set forth in those two documents?

Answer. If my appointment to the Federal Trade Commission is confirmed, I do intend to follow the FTC Statement on Horizontal Mergers (and to give the Department of Justice Merger Guidelines such appropriate weight as called for in the FTC Statement) and challenge mergers not in keeping with that document.

Question 2. Section 3.11(c) of the Department of Justice Merger Guidelines states that if, in an acquisition situation. "the increase in the HHI (Herfindahi-Hirschman Index) exceeds 100 and the post merger HHI substantially exceeds 1800, only in extraordinary cases will such factors (other than market share data) establish that the merger is not likely substantially to lessen competition." Given this statement of policy in the Department of Justice Guidelines and the policy of the Federal Trade Commission in its Statement on Horizontal Mergers that the Justice Department Guidelines will be given "considerable weight by the Commission and its staff in their evaluation of horizontal mergers," do you believe that the Commission should challenge an acquisition which results in an HHI of over 2,800 and an increase in the HHI of 400 points?

Answer. I think that an acquisition such as this hypothetical one should be examined very closely by the Commission regarding all potential anti-competitive effects, but can not give an absolute "yes" or "no" answer in the absence of a complete record. HHI figures are clearly relevant to an examination into the lawfulness of a proposed acquisition, but taken alone could give a misleading impression as to the impact of a specific transaction. Depending upon a variety of industry-specific characteristics (such as the likelihood that monopoly power would be acquired or collu-

sion facilitated; the degree of existing competition, including the number and health of existing competitors; whether competition would be increased or reduced within the industry; and the presence and magnitude of efficency gains to be passed on to consumers, or their absence, to name a few), the Commission possibly could be justified in challenging acquisitions with lower HHI numbers or in not challenging this hypothetical one. The correct answer for any given case can only be determined on the basis of a complete and vigilant review of all pertinent information. If confirmed, I will conduct such reviews for all cases that come before me in order to safeguard the national interest in vigorous competition.

Question 3. Do you intend to enforce Section 7 of the Clayton Act as it is currently written and applied pending Congressional action on the Administration's modification proposal?

Answer. The current Section 7 of the Clayton Act is the law, and I intend to enforce it as such unless and until amendments are enacted.

Question 4. At what level will line of business staff be maintained this fiscal year? Is it possible for outside researchers to use this data without the aid of professional FTC staff?

Answer. I am not familiar with the current level of the line of business staff, not do I know whether it is possible for outside researchers to use this date without the aid of professional FTC staff. If confirmed, I will investigate these questions as part of my participation in the budget process at the FTC.

Question 5. What are your views on the theory articulated in the *Ticor* case that the FTC is unconstitutional because its members cannot be fired by the President?

Answer. Since this is a question that may well come before me at the FTC, and since I am not currently versed in all the relevant arguments, I can only answer in the most general terms based upon my understanding at present. I think it is fair to state that until recently there was a widespread sense that the question of the FTC's constitutionality had been resolved in the affirmative by the Supreme Court in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935). If this is correct, then any contemporary legal challenge would logically have to seek either to distinguish or secure reversal of the precedent established fifty-plus years ago in Humphrey's Executor. Obviously, this is a matter of great importance. I will study it carefully if confirmed, and then reach and express my conclusions at the earliest appropriate time.

Question 6. Do you believe that Congress' sole purpose in enacting the antitrust laws was to promote economic efficiency among businesses? If not, what other purposes or policies underlie these laws? Are there any social policies involved? Do you believe, as a matter of policy, that we should tolerate *some* inefficiency if necessary to preserve a large number of competitors, especially small businesses?

Answer. The precise purpose(s) of Congress in enacting the antitrust laws is the subject of lively debate, so I want to thoroughly analyze the literature before reaching a firm conclusion. Clearly, at a minimum, the promotion of economic efficiency (or the prohibition of cartel-like restrictions on output and increases in price, to give an alternative formulation) is an extremely important rationale underlying the existence of the antitrust laws. Consumers have a direct stake in ensuring that the competitive operation of our nation's economy is not thwarted by anti-competitive manipulation that causes the twin ailments of artifically lowered production and correspondingly higher prices for those goods that are still produced. Except for the matter of properly regulated natural monopolies, I am skeptical of any assertion that, everything else being equal, the presence of a large number of competitors is likely to be inefficient. If anything, in many cases there is reason to infer that the presence of a large number of competitors (especially small businesses at the cutting edge of technological innovation) can help intensify competition and thereby improve efficiency.

U.S. SENATE,
Washington, DC, February 5, 1986.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science, and Transportation, U.S Senate, Washington, DC.

DEAR JACK: I am pleased to support the President's nomination of Andrew J. Strenio of Maryland to be a Member of the Federal Trade Commission. Mr. Strenio has outstanding professional credentials. We are fortunate that Mr. Strenio brings to the Commission recent administrative experience with the FTC's Bureau of Consumer Protection as well as important regulatory service as a Member of the Interstate Commerce Commission.

As you can see, Mr. Strenio has established an outstanding record of public service, and I am sure he'll continue to make important contributions as a Member of the FTC. I urge his approval by the Commerce Committee and early confirmation by the Senate.

With best wishes,

Sincerely,

CHARLES McC. MATHIAS, Jr.,
U.S. Senator.

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC, February 21, 1986.

Hon. JOHN C. DANFORTH,
Senate Commerce Committee,
Washington, DC.

DEAR JACK: It has come to my attention that Mr. Andrew John Strenio, Jr. is under consideration for the position as Commissioner of the Federal Trade Commission. I should like to offer my support for his nomination and urge the Committee to act without delay on his confirmation.

Mr. Strenio, a native of Erie, Pennsylvania has an extensive background, including having served as Commissioner at the Interstate Commerce Commission and as Assistant Director for Regulatory Evaluation, Bureau of Consumer Protection, at the FTC. He is most certainly an individual of the highest caliber. Having reviewed Mr. Strenio's qualifications and background, I am convinced that his work would prove to be valuable to the work of the Commission and I recommend him unreservedly for the post he seeks.

I commend Andrew Strenio to your attention and I ask that you afford his candidacy every consideration for nomination. If I can provide further information on his behalf, I will be happy to supply it.

Sincerely,

JOHN HEINZ,
U.S. Senate.

STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Mr. Chairman, I appreciate the opportunity to let the Committee know of the outstanding credentials of Andrew John Sternio, Jr., who has been nominated to be a commissioner of the Federal Trade Commission. Mr. Strenio has just completed his term as a Commissioner at the Interstate Commerce Commission, where he fulfilled his duties capably by keeping the interests of the American consumer paramount.

Mr. Strenio brings to the Commission a keen analytic mind and a deep commitment to public policy. His record at the Woodrow Wilson School of Public and International Affairs at Princeton University was exemplary. Mr. Strenio was the Princeton student body president and Rhodes Scholarship finalist. He graduated cum laude from Harvard Law School and simultaneously received a masters degree in public policy from Harvard's Kennedy School of Government. He has served as an economist and lawyer for the Council of Economic Advisers during the Carter Administration and previously for the Federal Trade Commission as Assistant Director for Regulatory Evaluation from 1982 to 1984.

Mr. Chairman, Mr. Strenio represents the type of appointment the Senate should encourage. The independent commissions were established to oversee diverse and complex segments of our economy. The Federal Trade Commission, with it's twin mandate of protecting consumers and fostering competition, has an especially crucial mission. Commissioners must put the general good of the U.S. economy and American consumer above the special interests of the industries they oversee. I am convinced Mr. Strenio will be able to do just that.

Mr. Strenio has served both a Republican administration and a Democratic administration with distinction. He has demonstrated professionalism and a high degree of integrity in all assignments. I believe he will be an excellent member of the Federal Trade Commission, and I hope that the Committee will come to the same conclusion in promptly reporting this nomination.

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